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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Robert W. Buffington, Special Referee

Appellate Case No. 2025-000968

Ex Parte: Texas Insurance Company, Appellant,

Viktar Kleuchenia, Respondent,

v.

Brian McCleod, Defendant.

RECORD ON APPEAL

October 24, 2025

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP2604596

Viktar Kleuchenia
PLAINTIFF(S)

Brian McLeod
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Motion/Summary Judgment is Granted.

Plaintiff's Motion/Strike Demand for Jury Trial & Refer/Special Referee is Granted.

Jared Williams to prepare formal order.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/11/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Horry Common Pleas

Case Caption: Viktar Kleuchenia VS Brian McLeod

Case Number: 2021CP2604596

Type: Order/Electronic Form 4

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Electronically signed on 2023-08-11 15:21:22 page 3 of 3

Certificate of Electronic Notification

Recipients

G. Smith - Notification transmitted on 08-11-2023 03:45:47 PM.

Jared Williams - Notification transmitted on 08-11-2023 03:45:47 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2021CP2604596

Official File Stamp: 08-11-2023 03:45:40 PM

Court: CIRCUIT COURT

Common Pleas

Horry

Case Caption: Viktar Kleuchenia VS Brian McLeod

Document(s) Submitted: Order/Electronic Form 4-Motion/Summary
Judgment is Granted Motion/Strike Demand for
Jury Trial & Refer/Special Referee is Granted

Filed by or on behalf of: Kristi F. Curtis

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

G. Michael Smith, Sr. for Brian McLeod

Jared Cyle Williams for Viktar Kleuchenia

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	CASE NO.: 2021-CP- 26-04596
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	PLAINTIFF’S MOTION TO STRIKE
	)	DEMAND FOR JURY TRIAL AND
v.	)	REQUEST FOR ORDER OF REFERENCE
	)	
BRIAN MCLEOD,	)	
	)	
Defendant.	)	

COMES NOW, Plaintiff Viktor Kleuchenia (“Plaintiff”), pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, respectfully moving the Court for an order to strike his demand for a jury trial in his Complaint and request the appointment of a special referee. The basis of Plaintiff’s motion is as follows:

1. This case arises out of a motor vehicle accident occurring on July 17, 2019, in Horry County, South Carolina.
2. Defendant Brian McLeod (“Defendant”) was insured by a liability policy with GEICO Indemnity Insurance Company (“GEICO”). Plaintiff had additional underinsured motorist (UIM) coverage with ONYX Insurance Company at the time of the accident.
3. On July 12, 2021, Plaintiff filed his Summons and Complaint against Defendant which included a demand for a jury trial.
4. On July 21, 2021, Plaintiff personally served Defendant with a copy of the Summons and Complaint and GEICO retained control of the defense through attorney G. Michael Smith, Esq., with the law firm of Thompson & Henry, PA.

5. On August 17, 2021, Plaintiff also served Onyx Insurance Company, as Plaintiff's UIM carrier, through the South Carolina Department of Insurance, pursuant to S.C. Code § 38-77-160. (See Exhibit A, Acknowledgment of Service).

6. Onyx Insurance Company did not file a notice of appearance or retain counsel to appear in the case upon being served with the Summons & Complaint.

7. Plaintiff subsequently learned that Texas Insurance Company had assumed all obligations and liabilities of ONYX Insurance Company effective June 30, 2021.

8. Out of an abundance of caution, Plaintiff served Texas Insurance Company with a copy of the Summons and Complaint through the South Carolina Department of Insurance pursuant to S.C. Code § 38-77-160. (See Exhibit B, Acknowledgement of Service).

9. Texas Insurance Company has not filed a notice of appearance or retained counsel to appear in the case since being served with the Summons & Complaint.

10. On January 25, 2023, Plaintiff and Defendant reached a settlement with Defendant's liability carrier through the acceptance of an Offer of Judgment filed with the Court.

11. Plaintiff is now continuing his claim to pursue additional UIM benefits against Texas Insurance Company, as assignee of Onyx Insurance Company.

12. S.C. Code Ann. § 38-77-160, which governs the liability of UIM carriers, provides in relevant part, "[t]he insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and *has thirty days after service of process on it to appear.*" See Ex Parte Allstate, 399 S.C. 202 (S.C. Ct. App. 2000) (emphasis added).

13. ONYX Insurance Company and/or Texas Insurance Company has not filed a notice of appearance in the case or assumed control of the defense at this time and has waived its right to appear pursuant to § 38-77-160.

14. Rule 53(b), *SCRCP*, provides in relevant part, that “in an action where the parties consent ... a case may be referred to a master or special referee by order of the circuit judge or the clerk of court. Rule 53(b) further notes that “[i]n all other cases, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case.”

15. Defendant has admitted liability and the appointment of a special referee would be appropriate to proceed forward on the sole issue of damages. (See Exhibit C).¹

16. There is no party to the case that objects to Plaintiff’s request for a special referee.

17. Plaintiff respectfully requests the Court enter an Order striking Plaintiff’s request for a jury trial demand in his Complaint and have the case assigned to a special referee for purposes of determining damages.

18. To the extent the Court would request a recommendation for someone to serve as special referee, Plaintiff would recommend the appointment of Bobby Buffington, Esq. to serve as special referee for the purpose of assessing damages in this case.

Respectfully submitted,

s/Jared C. Williams

Jared C. Williams

S.C. Bar No. 100806

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(843) 991-6528 – Office

(803) 429-3393 – Mobile

jared@williamslawsc.com

Attorney for the Plaintiff

April 10, 2023
Charleston, South Carolina

¹ Plaintiff has filed a separate Motion for Summary Judgment on the issue of liability that is also before the Court.



Horry Common Pleas

Case Caption: Viktar Kleuchenia VS Brian McLeod
Case Number: 2021CP2604596
Type: Order/Referred to Master or Special Referee

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Electronically signed on 2023-08-15 12:06:13 page 4 of 4

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NOTICE OF ELECTRONIC FILING [NEF]

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A filing has been submitted to the court RE: 2021CP2604596

Official File Stamp: 08-15-2023 12:06:24 AM

Court: CIRCUIT COURT

Common Pleas

Horry

Case Caption: Viktar Kleuchenia VS Brian McLeod

Document(s) Submitted: Order/Referred to Master or Special Referee
Order/Referred to Master or Special Referee

Filed by or on behalf of: Kristi F. Curtis

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The following people were served electronically:

G. Michael Smith, Sr. for Brian McLeod

Jared Cyle Williams for Viktar Kleuchenia

Robert Walton Buffington

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	CASE NO.: 2021-CP- 26-04596
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	ORDER GRANTING PLAINTIFF'S
	)	MOTION FOR SUMMARY JUDGMENT
v.	)	ON LIABILITY
	)	
BRIAN MCLEOD,	)	
	)	
<u>Defendant.</u>	)	

This matter came before the Court for hearing on August 8, 2023, on Plaintiff's Motion for Summary Judgment on Liability. After considering the pleadings, motions, exhibits, along with the arguments presented to the Court, the Court finds there is no genuine issue of material fact regarding Defendant's liability and Plaintiff is entitled to summary judgment as a matter of law on his causes of action for negligence and negligence *per se*.

STANDARD OF REVIEW

"Summary judgment is appropriate where there is no genuine issue of material fact, and it is clear that the moving party is entitled to judgment as a matter of law. Bank of N.Y. v. Sumter County, 387 S.C. 147, 154-55, 691 S.E.2d 473, 477 (2010). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). The party opposing summary judgment must set forth specific facts showing there is a genuine issue of fact for trial. Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 315-16, 372 S.E.2d 120, 122 (Ct. App. 1998).

FINDINGS OF FACT

Plaintiff filed suit against Defendant on July 12, 2021. Plaintiff served Defendant and counsel was retained through Defendant's liability carrier, GEICO. Plaintiff also served his UIM carrier, Onyx Insurance Company ("Onyx"), through the South Carolina Department of Insurance and filed proof of service with the Court. (Ex. A to Plf's Mot. to Strike). Onyx did not retain counsel and has not appeared in the case. Onyx was assumed by Texas Insurance Company ("Texas") and Plaintiff also served Texas Insurance Company through the South Carolina Department of Insurance and filed proof of service with the Court. (Ex. B to Plf's Mot. to Strike). Texas has not retained counsel and has not appeared in the case. Plaintiff reached a settlement with Defendant, through his liability carrier, on a covenant not to execute and is proceeding with the case to pursue UIM benefits.

Defendant's deposition was completed wherein he admitted fault for the accident. (Ex. A to Plf's Mot. for Summ. Judgment). Moreover, Defendant responded to Plaintiff's Requests for Admissions, wherein Defendant admitted he failed to keep a proper lookout; admitted he failed to yield to Plaintiff's right-of-way; admitted he was negligent in operating his motor vehicle; admitted his negligence proximately caused the accident; admitted he was at fault and liable for the accident; admitted Plaintiff was not at fault for the accident; admitted no third-party was at fault for the accident; and admitted Plaintiff suffered injuries proximately caused by the accident. (Ex. B to Plf's Mot. for Summ. Judgment).

CONCLUSIONS OF LAW

For the reasons set forth below, summary judgment on the issue of Defendant's liability is appropriate. Plaintiff submitted the relevant portions of Defendant's deposition transcript and *Defendant's Responses to Plaintiff's Requests for Admissions*, which sets forth Defendant's

admission of his breach of duty and causation. The evidence conclusively establishes Defendant's liability, along with the violation of a statute to grant summary judgment on Plaintiff's causes of action for negligence and negligence *per se*. There is no genuine issue of material fact as to Defendant's liability. Neither Defendant nor the UIM carrier has provided the Court with any opposing evidence to show that an issue of fact exists as to Defendant's liability.

THEREFORE, IT IS ORDERED that Plaintiff's Motion for Summary Judgment on the issue of Defendant's liability is granted regarding Plaintiff's causes of action for negligence and negligence *per se*, and the case will proceed forward on the sole issue of damages.

ORDERED this _____ day of August 2023.

Presiding Judge of the Fifteen Judicial Circuit



Horry Common Pleas

Case Caption: Viktar Kleuchenia VS Brian McLeod

Case Number: 2021CP2604596

Type: Order/Summary Judgment

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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NOTICE OF ELECTRONIC FILING [NEF]

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A filing has been submitted to the court RE: 2021CP2604596

Official File Stamp: 08-15-2023 01:51:47 PM

Court: CIRCUIT COURT

Common Pleas

Horry

Case Caption: Viktor Kleuchenia VS Brian McLeod

Document(s) Submitted: Order/Summary Judgment

Filed by or on behalf of: Kristi F. Curtis

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Jared Cyle Williams for Viktor Kleuchenia

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

VIKTAR KLEUCHENIA,

Plaintiff,

v.

BRIAN MCLEOD,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2022-CP- 26-04596

**ORDER OF JUDGMENT
FOR DAMAGES**

Plaintiff Viktor Kleuchenia ("Mr. Kleuchenia") brought this negligence action against Brian McLeod ("Mr. McLeod") for personal injuries and other damages sustained as a result of a motor vehicle collision occurring on July 17, 2018. For the reasons set forth below, the Court finds in favor of Mr. Kleuchenia in the amount of Three Million Two Hundred Fifty Thousand and 00/100 Dollars (\$3,250,000.00).

I. PROCEDURAL HISTORY

Mr. Kleuchenia filed suit against Mr. McLeod on July 12, 2021. Mr. Kleuchenia settled with Mr. McLeod's liability carrier on a covenant not to execute and proceeds to pursue UIM benefits. Mr. Kleuchenia served his UIM carrier through the South Carolina Department of Insurance, with proof of service filed with the Court. The UIM carrier has not appeared in the case.

The Court granted summary judgment on the issue of liability by order dated August 15, 2023, and referred the case to a special referee to assess Mr. Kleuchenia's damages. A bench trial was held on April 9, 2024.¹ Notice of the trial was provided to all parties, including the UIM carrier, who made no appearance.²

¹ The case file, including the transcript and copies of all exhibits, is held by counsel for Plaintiff.

² The Court notes that neither Mr. McLeod nor the UIM carrier has been held in default by order of the Court. The record shows Mr. McLeod appeared and plead through his liability carrier. The record further shows the issue of liability was heard on the merits by motion and order of the Court. The UIM carrier has been served with the pleadings and notice of the trial was provided.

Having considered the testimony and exhibits admitted at trial, as well as Plaintiff's Pre-trial Brief, the Court now makes the following findings of fact and conclusions of law in accordance with South Carolina Rule of Civil Procedure 52(a).

II. EVIDENCE AT TRIAL³

1. Mr. Kleuchenia was born on February 27, 1981. He is currently forty-three (43) years old and was thirty-seven (37) years old at the time of the wreck. (Tr. 18:9-22; Tr. 24:11-13).

2. Mr. Kleuchenia is originally from Belarus and resides at 617 36th Ave. N., Apt. G, Myrtle Beach, South Carolina since 2003. (Tr. 18:23-24).

3. Mr. Kleuchenia came to the United States by himself in 2003, when he was twenty-two (22) years old. (Tr. 20:3-7).

4. Mr. Kleuchenia attended four years of education in Belarus but was one year short of graduating. He did not receive a diploma and has no professional certifications. (Tr. 20:14-25; Tr. 21:1-2).

5. Mr. Kleuchenia spoke some English when he first came to the United States but primarily learned once he arrived. He speaks English as a second language. (Tr. 21:3-11).

6. Mr. Kleuchenia is divorced and has no children. He has no family in the United States. Both of his parents are alive and still reside in Belarus. (Tr. 21:21-24; Tr. 22:1-14).

A. The Motor Vehicle Collision

7. The motor vehicle collision between Mr. Kleuchenia and Mr. McLeod occurred in Horry County on July 17, 2018 (hereinafter "Collision"). (Tr. 24:6-10).

8. Mr. Kleuchenia was traveling north on Highway 17 when Mr. McLeod attempted to exit Avenue 52 to go south on Highway 17, pulling out in front of Mr. McLeod. (Tr. 32:5-19).

³ These findings are based on the preponderance of the evidence presented to the Court.

9. Mr. Kleuchenia testified the front of his vehicle impacted the driver side of Mr. McLeod's vehicle going approximately 40-45 miles per hour. (Tr. 33:20-22; 34:1-4).

10. Mr. Kleuchenia submitted two photographs of his vehicle following the Collision which showed significant property damage. (See Exhibits 1 and 2). The vehicle was deemed a total loss. (Tr. 25:22-24; Tr. 102:1-4).

B. Evidence Regarding Mr. Kleuchenia's Medical Treatment and Expenses

11. Mr. Kleuchenia testified he had no significant medical history prior to the Collision and had never had any prior injuries or medical treatment to his left foot, right knee, lower back, or abdomen. (Tr. 22:15-25; Tr. 23:1-3).

12. Mr. Kleuchenia reported to Grand Strand Regional on the day of the accident with complaints of chest pain, headache, back pain, and right knee pain. (See Ex. 4 at PLF029-PLF037).

13. He received CT imaging to his cervical, head, chest, and an x-ray to his right knee. (See Ex. 4 at PLF045-PLF049).

14. Mr. Kleuchenia followed up at Access Medical within days of the Collision with continued pain in his bilateral knees, bilateral back, bilateral wrists, bilateral arms, left foot, abdominal pain, and continued pain in his chest with deep breaths. (See Ex. 4 at PLF068-PLF069).

15. Mr. Kleuchenia received an additional CT scan of his abdomen, along with x-rays of his right knee, chest, left foot, and left knee. He was prescribed pain medications and referred for physical therapy. He is noted to have ongoing difficulty with breathing and his pain is rated for various body parts as a 5-10/10 during these initial visits. (See Ex. 4 at PLF 068-PLF087).

16. Mr. Kleuchenia was eventually referred to OrthoSC for orthopedic treatment to his left foot, right knee, and lower back. He was also recommended for a referral to a urologist for his abdominal pain. (Ex. 4. at PLF111).

17. On October 11, 2018, Mr. Kleuchenia was first seen at OrthoSC with pain at a 10/10 at worst. (Ex. 4 at PLF234). Mr. Kleuchenia has treated primarily with Dr. Christopher Crosby, DPM, for his left foot injury; Dr. Nathaniel R. Evans, M.D., for his right knee injury; and Dr. Stephen Parker, M.D. (pain management) and Dr. Todd Cook, M.D. (orthopedic surgeon) for his lower back injury. (See generally, Ex. 4).

Left Foot Injuries and Treatment

18. On September 26, 2018, Mr. Kleuchenia received an x-ray of the left foot noting degenerative changes and possible fracture of the first metatarsal phalanx joint. (Ex. 4 at PLF209).

19. On October 23, 2018, he was seen noting constant pain in his left foot described as aching, gnawing, and dull. He was provided an initial cortisone injection into the first MTP joint. (Ex. 4 at PLF242-244).

20. Mr. Kleuchenia followed up with Dr. Crosby for his left foot on several occasions noting continued pain, erythema, swelling, and decreased range of motion in the first MTP. (Ex. 4 at PLF249-PLF251; PLF255-PLF257; PLF274-PLF276; PLF298-PLF300).

21. On July 16, 2020, Dr. Crosby prescribed Indomethacin and recommended an MRI to further evaluate for tendonitis or stress fracture. (Ex. 4 at PLF334-PLF337).

22. Mr. Kleuchenia received an MRI of the left foot noting great toe metatarsophalangeal joint disease with degenerative joint effusion and medial bursitis, along with edema of the anterior ankle, distal fibula, and os trigonum. (Ex. 4 at PLF338-PLF343).

23. On August 6, 2020, upon review of the MRI, Dr. Crosby recommended surgical intervention for a total joint replacement of the first MTP. (Ex. 4 at PLF338-340).

24. Mr. Kleuchenia did not receive surgery at that time but continued to follow up with Dr. Crosby on several occasions recommending supporting shoes, rest, ice, medications, and physical therapy until surgery is decided. (Ex. 4 at PLF350-PLF353).

25. On January 21, 2021, Dr. Crosby set forth his opinions to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia suffered injuries to his left foot from the Collision; the medical treatment provided has been reasonable and medically necessary; and Mr. Kleuchenia will require future medical treatment for his left foot. (Ex. 4 at PLF972-PLF973).

Right Knee Injuries and Treatment

26. On July 18, 2018, Mr. Kleuchenia received an x-ray from Grand Strand Regional Medical Center noting "internal derangement of the right knee." (Ex. 4 at PLF029-PLF037).

27. On September 18, 2018, Mr. Kleuchenia followed up at Access Medical noting persistent ambulatory pain and catching and was referred for orthopedic treatment. (Ex. 4 at PLF082-PLF083).

28. On October 11, 2018, Mr. Kleuchenia was first seen at OrthoSC noting pain and symptoms of popping and clicking. (Ex. 4 at PLF231-PLF234).

29. On November 7, 2018, Mr. Kleuchenia received an MRI confirming a partial ACL and meniscus tear, tibial spine avulsion fracture, and patellofemoral chondromalacia. (Ex. 4 at PLF212-PLF213).

30. On December 5, 2018, Mr. Kleuchenia was seen by Dr. Evans following his MRI initially suggesting a possible ACL reconstruction but recommended attempting conservative treatment before proceeding. He received an initial cortisone injection, was prescribed pain medications, and provided a referral for physical therapy. (Ex. 4 at PLF252-PLF254).

31. On April 10, 2019, Dr. Evans confirmed Mr. Kleuchenia had failed conservative treatment and suggested proceeding with arthroscopic chondroplasty. (Ex. 4 at PLF290-PLF292).

32. On December 16, 2019, Dr. Evans performed a chondroplasty of Mr. Kleuchenia's right knee noting significant inflammation of the synovium in the patellofemoral compartment causing impingement. Dr. Evans shaved and debrided chondromalacia present in the inferior pole

and tibial insertion of the patella. Dr. Evans noted post-operatively that if this procedure did not resolve his symptoms his further recommendation would be ACL reconstruction verse reattachment of the tibial footprint of the ACL. (Ex. 4 at PLF380-PLF381).

33. Mr. Kleuchenia completed post-operative physical therapy with continued complaints. (Ex. 4 at PLF312-PLF314).

34. On January 2, 2020, Dr. Evans reviewed images from the initial surgery noting Mr. Kleuchenia's tibial avulsion fracture was causing impingement on his partially torn ACL during extension and flexion of his knee. (Ex. 4 at PLF312-314).

35. On March 17, 2020, Mr. Kleuchenia followed up again with Dr. Evans noting continued pain in his right knee to be a 4/10. Dr. Evans recommended additional surgery at this time. (Ex. 4 at PLF325-PLF328).

36. On May 11, 2020, Dr. Evans performed a second surgery to address the tibial eminence/tibial spine fracture. Dr. Evans shaved and debrided the tibial spinal fracture and used a trans-osseous suture technique to reattach the tibial footprint. Dr. Evans drilled through the anterior tibia to suture and tied the tibia bone in place. The torn fibers of the ACL and the partially torn meniscus do not appear to be addressed during the procedure. (Ex. 4 at PLF383-PLF385).

37. Mr. Kleuchenia completed additional post-operative physical therapy with some initial improvement before declining and receiving a second opinion. (Ex. 4 at PLF332-PLF334).

38. On October 12, 2021, Mr. Kleuchenia was evaluated by Dr. Kevin Nahigian, M.D., with Carolina Shoulder & Knee Specialists, LLC, with ongoing pain noted to be a 6/10. (Ex. 4 at PLF963-PLF967).

39. Dr. Nahigian performed updated x-rays noting substantial chondral changes in the patellofemoral compartment and suggested repeat chondroplasty to relieve his symptoms. Dr.

Nahigian did not feel ACL reconstruction was necessary at this stage because Mr. Kleuchenia had good stability. (Ex. 4 at PLF963-PLF967).

40. Dr. Nahigian opines Mr. Kleuchenia has incurred a 10% permanent impairment to his right lower extremity as a result of his injuries. (Ex. 4 at PLF967).

41. On September 7, 2020, Dr. Evans set forth his opinions to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia suffered injuries to his right knee as a result of the Collision; the medical treatment provided has been reasonable and medically necessary; and he would require future medical treatment. (Ex. 4 at PLF970-PLF971).

Lower Back Injuries and Treatment

42. Mr. Kleuchenia reported to Grand Strand on the day of the accident with complaints of back pain. (Ex. 4 at PLF029-PLF037).

43. On August 15, 2018, Mr. Kleuchenia followed up at Access Medical noting ongoing lower back pain and received x-rays noting spondylosis with foraminal narrowing at the L5-S1. (Ex. 4 at PLF074-PLF076).

44. On October 10, 2018, Mr. Kleuchenia was seen again at Access Medical noting pain across his lower back that radiates into his bilateral legs rated at an 8/10 and was referred for orthopedic treatment. (Ex. 4 at PLF086-PLF087).

45. On January 8, 2019, Mr. Kleuchenia followed up at Access Medical reporting pain in his low back radiating into his buttocks and legs. His pain is noted to be severe and worsening as an 8-10/10. (Ex. 4 at PLF269-PLF271).

46. On January 11, 2019, Mr. Kleuchenia received an MRI of his lumbar spine noting a right foraminal annular tear and disc protrusion causing mild right foraminal stenosis abutting the exiting nerve root in the foramen at the L4-5; and a central posterior annular tear with disc protrusion causing a ventral indentation on the thecal sac at the L5-S1. (Ex. 4 at PLF273).

47. On January 30, 2019, Mr. Kleuchenia was seen at OrthoSC with pain noted as a constant 6-7/10, affecting his ADL's and life activities. He was recommended physical therapy before undergoing a series of three lumbar transforaminal injections. (Ex. 4, PLF277-PLF279).

48. On July 31, 2019, Mr. Kleuchenia followed up with Dr. Cook noting pain at a 6-8/10 and that his pain affects his ability to walk, sit, stand, drive, do outside activities, and getting dressed. Injections were recommended at this time. (Ex. 4 at PLF293-PLF295).

49. On October 1, 2019, Mr. Kleuchenia received his first lumbar transforaminal epidural steroid injection at the L4-5 and L5-S1 under fluoroscopy. (Ex. 4 at PLF296-PLF297).

50. On October 22, 2019, Mr. Kleuchenia following up reporting no relief from the initial injection and a second injection was administered. (Ex. 4 at PLF301-PLF302).

51. On November 20, 2019, Mr. Kleuchenia followed up again reporting no relief from the second injection and the third injection was not recommended. A surgical evaluation was ordered. (Ex. 4 at PLF303-PLF306).

52. On December 9, 2019, Mr. Kleuchenia was seen by Dr. Cook who reviewed the prior imaging and confirmed its findings of foraminal disc protrusion on the right at the L4-5 that compresses the L4 nerve, and central disc protrusion of the L5-S1. Dr. Cook ordered and updated MRI for further evaluation. (Ex. 4 at PLF307-PLF309).

53. On December 10, 2019, a second MRI of the lumbar spine was completed noting a broad-based annular bulge with right posterior lateral annular tear and disc protrusion creating right exiting foraminal narrowing at the L4-5; broad-based annular bulge with central annular tear, broad-based central disc protrusion at the L5-S1. (Ex. 4 at PLF310-PLF311).

54. On January 8, 2020, Dr. Cook reviewed the MRI confirming its findings but noted it appeared to be stable compared to his prior imaging. Dr. Cook recommended holding on surgery and proceeding with a series of three facet injections at the L4-S1. (Ex. 4 at PLF315-PLF316).

55. On January 21, 2020, Mr. Kleuchenia received an initial lumbar facet injection and a second injection on February 4, 2020. (Ex. 4 at PLF318-PLF321).

56. On February 24, 2020, Mr. Kleuchenia followed up with Dr. Cook reporting no relief from the injections. Dr. Cook recommended conservative treatment including injections, medications, and bracing to hold on surgery for as long as possible. (Ex. 4 at PLF322-PLF324).

57. On September 22, 2021, Mr. Kleuchenia was evaluated by Dr. Steven Poletti, M.D. at Southeastern Spine Institute. Upon review of the imaging, Dr. Poletti confirmed multilevel disc protrusion at the L4-5 and L5-S1 with radiculopathy. (Ex. 4 at PLF968-PLF969).

58. Dr. Poletti opined Mr. Kleuchenia could undergo a discectomy and ankylosis of the L4-5 and L5-S1, but that he should exhaust all conservative treatment options such as L4 selective nerve root blocks and lumbar facet rhizotomy on the right at the L4-5 and L5-S1 before proceeding with any surgery. (Ex. 4 at PLF968-PLF969).

59. Dr. Poletti assigned a 23% whole person impairment as a result of Mr. Kleuchenia's lower back injuries. (Ex. 4 at PLF969).

60. On March 20, 2022, Dr. Cook set forth opinions to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia suffered injuries to his lower back as a result of the Collision; the medical treatment provided has been reasonable and medically necessary; and Mr. Kleuchenia would require future medical treatment for his lower back. (Ex. 4 at PLF974).

Abdomen/Hernia Injuries and Treatment

61. On July 17, 2018, Mr. Kleuchenia was seen at Grand Strand Regional Medical Center with complaints of, among other things, abdominal pain. (Ex. 4 at PLF029-PLF037).

62. On November 11, 2018, Mr. Kleuchenia was seen at Access Medical noting unspecified abdominal pain and referred for a CT scan of the abdomen. (Ex. 4 at PLF095-PLF098).

63. On December 7, 2019, Mr. Kleuchenia followed up at Access Medical with abdominal pain and referred for an x-ray of the abdomen and pelvis. (Ex. 4 at PLF099-PLF102).

64. On December 18, 2019, Mr. Kleuchenia followed up to review his imaging confirming an umbilical hernia and was provided a urology referral. (Ex. 4 at PLF105-PLF107).

65. Mr. Kleuchenia was seen several times at Atlantic Urology for complaints of flank pain and nocturnal enuresis (bedwetting). The records note Mr. Kleuchenia's flank pain and bedwetting are likely the result of his low back injury and the doctors recommended pain management treatment.⁴ (Ex. 4 at PLF936-PLF953).

66. On December 2, 2021, Mr. Kleuchenia was seen by Dr. Gilbertas Rimkus, M.D. at Conway Medical Center and received an updated CT scan of the abdomen, again, confirming the presence of an umbilical hernia. (Ex. 4 at PLF997-PLF1000).

67. On January 4, 2022, Dr. Rimkus set forth opinions to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia's umbilical hernia was the result of the Collision and surgery would be reasonable and medically necessary. (Ex. 4 at PLF1001).

68. On January 12, 2022, Mr. Kleuchenia underwent surgical repair of his hernia with the placement of a mesh. (Ex. 4 at PLF997-PLF1000).

69. In addition to the medical records admitted into evidence, Dr. Todd Joye, M.D., CLCP, testified as an expert in the areas of general medicine, pain management, and life care planning. (Tr. 91:21-25).

70. Dr. Joye testified to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia's injuries to his left foot, right knee, lower back, and hernia were causally related to the Collision. (Tr. 102:5-11).

⁴ Medical records from Access Medical also note possible shifting of the viscera and "floating kidney." (Ex. 4 at PLF105-PLF107). On November 2, 2022, Dr. Ferraro confirmed a shift in Mr. Kleuchenia's kidneys from the supine position to upright position and recommended laparoscopic nephropexy. (Ex. 4 at PLF1032-PLF1033). Mr. Kleuchenia is not requesting compensation for any kidney problems and this issue is not part of his claim for damages.

71. Dr. Joye also testified to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia's medical treatment he has received for his left foot, right knee, lower back, and hernia has been reasonable and medically necessary. (Tr. 105:1-6).

72. Mr. Kleuchenia's medical records and bills totaling \$116,875.10 were admitted into evidence as Exhibit 4.

C. Evidence Regarding Future Medical Treatment and Costs

73. Dr. Joye prepared a life care plan and testified to the process and details of the medical recommendations (See Ex. 6; see generally Tr. 87:10-135:15).

74. Dr. Joye testified he used standard methods and procedures accepted in the field of life care planning and in his practice as a physician. (Tr. 94:12-96:7).

75. In addition to the medical records and his own evaluation, Dr. Joye testified he reviewed and relied on the physician statements and evaluations setting forth opinions on causation and future medical treatment. Specifically, Dr. Joye reviewed the physician statement of Dr. Crosby regarding Mr. Kleuchenia's left foot; the physician statement of Dr. Evans regarding Mr. Kleuchenia's right knee; the independent medical evaluation of Dr. Nahigian regarding Mr. Kleuchenia's right knee; the physician statement by Dr. Cook regarding Mr. Kleuchenia's lower back; and the independent medical evaluation by Dr. Poletti regarding Mr. Kleuchenia's lower back. (Tr. 96:15-25; Tr. 97:1-4; see also Ex. 6 at PLF1036-1036).

76. Dr. Joye testified he used his own knowledge and experience as a board-certified pain management physician in preparing the life care plan. (See Ex. 6; Tr. 92:21-25)

77. Dr. Joye's medical cost projection contains the following medical treatment categories: i) physician services; ii) routine diagnostics; iii) medications; iv) laboratory studies; v)

rehabilitation services; vi) equipment and supplies; and vii) additional treatment/surgical treatment. (Ex. 6 at PLF1042-1043; Tr. 119:14-132:19).

78. Dr. Joye testified in detail to each specific recommendation set forth in the life care plan, including the cost, frequency, and duration of each recommendation. (Tr. 119:14-132:19).

79. Dr. Joye testified the treatment set forth in the medical cost projection is causally related to the injuries Mr. Kleuchenia sustained in the Collision. (Tr. 132:20-133:1).

80. Dr. Joye testified, to a reasonable degree of medical certainty, the treatment set forth in the life care is reasonably likely to occur during Mr. Kleuchenia's lifetime. (Tr. 133:2-6).

81. Dr. Joye used the South Carolina Life Expectancy Tables to calculate Mr. Kleuchenia's projected life expectancy and future costs. (Tr. 116:3-12.).

82. The total cost of the treatment set forth by Dr. Joye's life care plan is \$1,160,044.09, before converting the amount to present value and adjusting for inflation. (Ex. 6 at PLF1040).

83. Dr. Joye's life care plan was admitted into evidence as Exhibit 6.

84. Dr. Oliver Wood, Jr., PhD, testified as an expert in economic loss and testified to the value of Dr. Joye's life care plan in present value with adjustment for inflation. (Tr. 140:6-11).

85. Dr. Wood testified he projected the cost of the life care plan out to Mr. Kleuchenia's life expectancy according to the South Carolina Code of Laws, adjusted for the cost for inflation, and discounted the cost to present day value. (Tr. 146:12-148:25).

86. Dr. Wood testified the total present-day value of Mr. Kleuchenia's future medical cost, with adjustment for inflation, is \$799,901.00. (Tr. 148:12-25; see also Ex.7.). The Court took into account Plaintiff's reluctance to have surgery, which reasonably would have alleviated his condition from an economic and noneconomic damages perspective and the verdict reflects that evidence.

D. Evidence Regarding Lost Wages, Loss of Earnings and Earning Capacity, Loss of Employment and Business Opportunities, Loss of Personal Services

87. At the time of the Collision, Mr. Kleuchenia was the owner of Imperial Cab, LLC, where he had operated his own cab service since 2007. (Tr. 24:14-25:1. Tr. 74:25).

88. Mr. Kleuchenia testified he purchased a flatbed truck and began hauling freight in April and May of 2018 for AC Shipping, LLC on a part-time basis. (See Ex. 3; Tr. 26:19-29:6).

89. Mr. Kleuchenia testified he planned to terminate his cab business after the summer of 2018, and move to New Jersey to haul freight for AC Shipping, LLC full-time. (Tr. 30:17-). The Court took into account and carefully considered the speculative nature of Plaintiff's recent employment change shortly before the time of this accident and the verdict reflects the speculative nature of Plaintiff's future employment plans.

90. Mr. Kleuchenia testified he expected to earn at least \$500.00 a day, less approximately \$100.00 a day in expenses. (Tr. 31:4-6).

91. Mr. Kleuchenia testified he has not worked in any capacity since the Collision on July 17, 2018, and has had no income. (Tr. 37:1-20).

92. Cynthia Grimly, MS, CRC, CCM, DABVE, IPEC, performed a vocational evaluation of Mr. Kleuchenia and testified as an expert in the field of vocational evaluations and assessments. (See Ex. 5; Tr. 56:23-85:11).

93. Ms. Grimley testified she performed her vocational evaluation using standard methods accepted in the vocational field, including a transferable skills analysis. (Tr. 64:1-16).

94. Ms. Grimley testified to her process in developing her opinions, including reviewing Mr. Kleuchenia's medical records, physician statements, functional capacity evaluation, and meeting with and interviewing Mr. Kleuchenia, and testified to her findings and opinions in detail. (63:17-85:10).

95. Ms. Grimley testified, to a reasonable degree of vocational certainty, Mr. Kleuchenia has suffered a 100% loss of employability to the competitive labor market because of his injuries from the Collision and that his condition is permanent. (Tr. 81:17; Tr. 82:2-83:2).

96. Ms. Grimley testified she reviewed the affidavit of Alex Yanushko, owner of AC Shipping, LLC, setting forth an offer of employment with expected wages of \$100,000 a year, and that this amount was conservative and reasonable as a car transporter. (Tr. 75:14-77:3).

97. Ms. Grimley's vocational report was admitted into evidence as Exhibit 5.

98. Dr. Joye also testified, in his opinion as a physician, Mr. Kleuchenia could no longer do his job as a cabdriver or car transporter based on his condition. (Tr. 108:7-11).

99. Mr. Kleuchenia testified to his inability to perform household chores such as driving, shopping for groceries, cooking, and cleaning. (Tr. 49:21-52:12).

100. Dr. Joye testified Mr. Kleuchenia's injuries are permanent, and that treatment would not likely change his condition or employability. (Tr. 134:6-135:7).

101. Dr. Wood testified he evaluated Mr. Kleuchenia's financial loss based on Ms. Grimley's vocational report, the affidavit of Alex Yanushko, Dr. Joye's life care plan, and information obtained through interviewing Mr. Kleuchenia. (Tr. 142:13-144:25).

102. Dr. Wood testified, to a reasonable degree of economic certainty, Mr. Kleuchenia has incurred pre-trial loss in earnings of \$560,000.00, and pre-trial loss in personal services of \$24,961.00; for a combined pre-trial economic loss of \$584,961.00. (Ex. 7; Tr. 144:18-145:13).

103. Dr. Wood testified he used the South Carolina Life Expectancy Tables to calculate Mr. Kleuchenia's life expectancy to be 41.16 years at the time of the Collision in evaluating his future losses. (Ex. 7; Tr. 140:20-25).

104. Dr. Wood testified, to a reasonable degree of economic certainty, Mr. Kleuchenia will incur a post-trial loss in earning capacity of \$2,075,614.00, converted to present value. (Tr. 149:1-4).

105. Dr. Wood testified, to a reasonable degree of economic certainty, Mr. Kleuchenia's post-trial loss in personal services is \$106,582.00, converted to present value. (Tr. 149:4-6).

106. Overall, Dr. Wood testified Mr. Kleuchenia's total financial loss of earnings and loss or earning capacity is \$2,635,614.00; total loss of personal services is \$131,543.00; for a total economic loss of \$3,566,259.00, converted to present value and exclusive of any past medical expenses incurred. (Ex. 7; Tr. 149:1-14).

E. Evidence Regarding Noneconomic Damages -- Pain and Suffering, Mental Anguish, Loss of Enjoyment of Life, Permanent Impairment, Other Non-Pecuniary Losses

107. Mr. Kleuchenia testified that prior to the Collision he was sociable and active. He enjoyed going to cookouts and out to eat with friends. He enjoyed riding his bike for exercise, working on vehicles, and gardening. (Tr. 23:17-24:5).

108. Mr. Kleuchenia's medical records consistently note pain in his left foot to constantly be anywhere from a 6-8/10 and described as "aching, stabbing, and sharp" (Ex. 4 at PLF342). His right knee pain is constantly noted to be anywhere from a 4-6/10 and described as "sharp." (Ex. 4 at PLF965). His lower back pain is constantly noted to be "severe" and rated anywhere between a 6-10/10, while described as "burning, stabbing, sharp, constant" ... with radiating pain, numbness, and tingling into his bilateral legs and that "nothing helps" alleviate pain. (See Ex. 4 at PLF308).

109. The medical records further document his pain is aggravated by sitting, standing, walking, lifting, carrying, twisting, range of motion, and going from sitting to standing. (See Ex. 4 at PLF308). Dr. Cook notes his injuries affect his activities of daily living and life activities. (See

Ex. 4 at PLF278). Dr. Cook further noted his pain affects his ability to walk, sit, stand, drive, do outside activities, and getting dressed. (Ex. 4 at PLF293-PLF295).

110. Mr. Kleuchenia testified he continues to have pain in his left foot after being on his feet for more than twenty (20) to forty (40) minutes, depending on the activity. He uses an ice bucket with cold water to ice his left foot every day. He feels his left foot injury is getting worse and he is currently prescribed medications for gout. (Tr. 38:23-40:12).

111. Mr. Kleuchenia testified he continues to have pain in his right knee. He is conscious about his knee when on his feet to not cause further injury and can't be upright for more than one hour because of his knee. He continues to have clicking and popping in the right knee. He uses handrails for stairs and when descending stairs and uses one stair at a time. He feels his right knee injury is getting worse. (Tr. 41:22-42:19).

112. Mr. Kleuchenia testified he continues to have constant and significant pain in his lower back and can't be upright, standing or sitting, for more than approximately one hour before having to lay down due to pain. The only relief is laying down. He feels his lower back condition is getting worse. (Tr. 45:19-45:10).

113. Mr. Kleuchenia and Dr. Joye testified his back pain is so significant he spends every day restrained to his bed and cannot be upright for more than forty-five (45) minutes to an hour without having to lay down. (Tr. 45:2-10; Tr. 157:1-6).

114. Mr. Kleuchenia testified he suffers from persistent diarrhea and bedwetting since the Collision which his doctors have contributed to his lower back injury. (Tr. 46:20-47:8;).

115. Mr. Kleuchenia testified he gets unbearable pain when standing after several minutes. He also has pain and limitations with bending, lifting, or carrying objects and bought a four-wheel hand truck to carry items from his car to his apartment. (Tr. 45:19-25; Tr. 50:15-25).

116. Mr. Kleuchenia testified his injuries affect his ability to drive any significant distance. He does not drive long distances anymore but testified he has had to travel for a doctors' appointments that required him to pull over and lay down in his vehicle. (Tr. 50:10-51:1).

117. Mr. Kleuchenia worries about his future medical status, the recommended surgeries, and whether those treatments will make him better or worse. He worries about how he is going to support himself financially. (Tr. 46:4-8; Tr. 51:2-4).

118. Mr. Kleuchenia is no longer active and unable to exercise. He has not ridden his bicycle since the Collision and has gained forty (40) to fifty (50) pounds since the accident. (Tr. 48:21-25; Tr. 51:5-10).

119. Mr. Kleuchenia no longer cooks like did prior to the Collision because he can't be upright on his feet long enough. He has a friend who allows him to pick up food from a buffet or he purchases premade meals. (Tr. 51:11-19).

120. Mr. Kleuchenia is unable to adequately clean his apartment and has issues with vacuuming, sweeping, and dusting. He testified his apartment is dirty and cluttered since the Collision and he is too embarrassed to have people over due to its condition. (Tr. 51:20-52:12).

121. Mr. Kleuchenia does not participate in social events because he cannot be on his feet long enough. Even the time he can be up he does not enjoy being there because he is in pain. He testified specifically to an event in February of this year where he was at a friend's house and fell over because of his back pain, was forced to lay down and his friends wanted to call the ambulance for him. (Tr. 52:24-53:3).

122. Mr. Kleuchenia testified he has pain even when sitting upright for periods of time and cannot enjoy social events such as going to see a movie. (Tr. 53:4-17).

123. Mr. Kleuchenia testified he has not traveled to see his parents in Belarus since the Collision because of his condition. His parents are elderly and in their seventies. (Tr. 53:18-54:2)

124. Mr. Kleuchenia testified he feels like his life has changed and he is unable to enjoy anything because he must stay in bed all day. (Tr. 54:3-17).

125. Mr. Kleuchenia testified prior to the Collision he was dating and had hopes of remarrying and having children. He no longer dates and feels he cannot be a boyfriend or husband in his condition. (Tr. 54:18-55:5).

126. Mr. Kleuchenia's testimony is consistent with the information in Ms. Grimley and Dr. Joye's reports, along with their testimony regarding his functional limitations. (See Ex. 5 and 6; see also Tr. 56:23-135:17).

III. CONCLUSIONS OF LAW

A. Liability

The Court has entered summary judgment on the issue of liability.

B. Damages

Actual damages – consisting of economic and noneconomic damages – includes compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant. Rogers v. Florence Printing Co., 233 S.C. 567, 107 S.E.2d 258 (1958).

In determining the amount of compensation for the Plaintiff's injuries, it is proper to consider past, present, and future aspects of the injuries. See Todd v. Joyner, 385 S.C. 509, 518, 685 S.E.2d 613, 618 (Ct. App. 2008); Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001). The principle underlying compensation for future damages is that only one action can be brought and, therefore, only one recover had. A Plaintiff's life expectancy should be considered in assessing future damages. See id.; see also S.C. Code Ann. § 19-1-150.

Economic damages consist of any pecuniary damages such as past and future medical expenses, loss of earnings and earning capacity, loss of income, costs of obtaining substitute

domestic services, loss of personal services, loss of employment, loss of business or employment opportunities, and other monetary losses. See S.C. Code § 15-32-210(3).

"It is a fundamental principle of law of damages that a person who suffers personal injuries because of the negligence of another is entitled to recover the reasonable value of medical care and expenses incurred for the treatment of the injuries to the time of trial." Haselden v. Davis, 341 S.C. 486, 491, 534 S.E.2d 295, 298 (Ct. App. 2000).

A person who suffers personal injuries because of the negligence of another is entitled to recover the reasonable full market value of medical care and expenses that are reasonably certain to occur in the future. Pearson v. Bridges, 344 S.C. 366, 544 S.E.2d 617 (2001). The plaintiff does not have to prove that these future expenses are more likely than not to occur in the future, only that they are reasonably likely to occur. See id.

Lost wages and loss of future income and earning capacity are proper elements of compensation. See S.C. Code Ann. § 15-32-210(3); see also Matthews v. Porter, 239 S.C. 620, 622, 124 S.E.2d 321, 322 (1962). This requires a consideration of all matters that relate to the issue of disability, the effect which that disability will have on Plaintiff's capacity to work, the extent to which the disability will impair the Plaintiff's earning capacity, the present value of all losses due to his impaired earning power, any loss in the ability to perform household services, and any such losses reasonably certain to result in the future from his injuries. See id.; see also Steeves v. U.S., 249 F. Supp. 446 (D.C.S.C. 1968).

Noneconomic damages include "damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, other nonpecuniary damages, and any other theory of damages including, but not limited to, fear of loss, illness, or injury." S.C. Code Ann. § 15-32-210(9).

An award for pain and suffering compensates the injured person for the physical discomfort and emotional response to the sensation of pain caused by the injury. See Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001). In determining the award, is proper to consider the nature and extent of injuries and duration of suffering; the age, health, habits, and conditions of the injured party before the injuries; the use of sedatives or drugs to relieve pain; and any aggravation of pre-existing conditions. See id.

Mr. Kleuchenia presented for medical treatment following the accident with pain in multiple body parts and diagnosed with dyspnea (shortness of breath) due to pain in his chest. He has continued to endure pain in multiple body parts since the Collision. His pain is constantly documented throughout the medical records as 6-8/10 for his left foot, a 4-6/10 for his right knee, and a 6-10/10 for his lower back. The medical records further note the pain in his lower back is constant with no relief. Dr. Cook noted his pain affects his activities of daily living, and limits his ability to walk, sit, stand, drive, do outside activities, and getting dressed.

Mr. Kleuchenia's, Ms. Grimley's and Dr. Joye's testimony confirm his lower back pain is so significant he cannot be upright or on his feet for more than approximately one hour. Likewise, evidence shows that Mr. Kleuchenia continues to have left foot and right knee pain despite the limited amount of time he can be on his feet. The Court makes note that Mr. Kleuchenia had to take a break early in his testimony so he could lay down and provide relief for his lower back.

The medical records and Mr. Kleuchenia's testimony establish his pain is worsening in his left foot, right knee, and lower back. Moreover, the evidence establishes Mr. Kleuchenia's condition to the left foot, right knee, and lower back are all permanent conditions, which will cause ongoing pain and suffering, including likely surgeries to each body part that will result in further pain and suffering. The Court also takes into consideration his abdominal pain noted from the date of the Collision and resulting hernia surgery in assessing its award for pain and suffering.

An injured party may also recover for the corresponding mental suffering which flows as a natural consequence of the wrongful act. See id. "Mental anguish" includes the mental sensation of pain and the accompanying feelings of distress, fright, anxiety, disappointment, anger, worry, resentment, embarrassment, grief, severe disappointment, indignation, anxiety, depression, wounded pride, shame, despair, and humiliation. See id.

As previously noted, Mr. Kleuchenia suffers from continuing pain in multiple body parts that is likely to remain throughout his lifetime and affect his daily life. Mr. Kleuchenia will have to endure his injuries and their effects every day, for the rest of his life. He has incurred multiple surgeries to date and faces many more in the future. He suffers from persistent diarrhea and bedwetting since the Collision.

Mr. Kleuchenia experiences anxiety when driving and worries about his future condition and finances. Dr. Joye described him as a "recluse," being restrained to a bed and having no social engagement. He feels he would be a burden as a companion and would not be able to contribute as a potential boyfriend, husband, or father.

An injured party may recover damages for "loss of enjoyment of life" which is intended to compensate for the limitations on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or the individual's inability to pursue talents, interests, hobbies, or avocations. See Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001) ("Loss of enjoyment of life" is a compensable element, separate and apart from pain and suffering.).

Mr. Kleuchenia is no longer able to participate in and enjoy simple social events such as cookouts, gatherings, going out to eat, or movies with friends. He is no longer able to exercise and ride his bike and has gained at least forty (40) pounds since the Collision. The evidence in totality establishes that Mr. Kleuchenia now spends every day at home, lying in bed, without much social

contact or engagement. He cannot leave his house for much more than one hour at a time before having to return or find some way of laying down to relieve his pain.

Mr. Kleuchenia's injuries have also affected his family relationships and goals. He has not been able to visit his elderly parents in Belarus since the Collision because of his injuries and worries he may never see them again before they pass. Mr. Kleuchenia testified that prior to the Collision he was dating and had hopes of remarrying and having children. He now has no dating life and feels that having any type of relationship is impossible because of his condition.

The evidence presented establishes that Mr. Kleuchenia is severely limited in his ability to engage in any meaningful or enjoyable activities because of his injuries and that his relationships have been significantly affected and will continue to be affected.

S.C. Code Ann. § 15-32-210(9) provides compensation for any physical impairment suffered by an injured person. See also Todd v. Joyner, 385, S.C. at 518 ("actual damages include [among others] ... impairment of health or physical condition.").

Dr. Nahigian evaluated Mr. Kleuchenia and assigned a 10% permanent impairment to his right lower extremity pursuant to the AMA Guides. Dr. Poletti evaluated Mr. Kleuchenia and assigned a 23% permanent impairment to his whole person resulting from his lower back injury pursuant to the AMA Guides. An impairment rating has not been addressed for his left foot, but the evidence establishes there would likely be some amount of permanent impairment.

Mr. Kleuchenia's physical impairment is consistently documented throughout the evidence including, but not limited to, medical records, physician statements, functional capacity evaluation, vocational report, life care plan, and witness testimony. Mr. Kleuchenia is severely impaired in his physical function and abilities, causing him to be largely bedridden. Mr. Kleuchenia continues to suffer from impairment in his left knee and lower back.

S.C. Code Ann. § 15-32-210(9) further sets forth compensation for any other non-pecuniary loss including, but not limited to, inconvenience, disfigurement, permanent scarring, and fear of loss, illness, or injury.

Based on the evidence, Mr. Kleuchenia has attended over eighty (80) physician appointments with numerous doctors and countless physical therapy visits. He has undergone three surgeries to date and needs two additional surgeries currently. He will likely require at least three additional surgeries later in his lifetime, all of which will likely result in some degree of pain, suffering, mental anguish, and scarring. Once all said and done, Mr. Kleuchenia will have hardware in his left foot (joint replacement), right knee (joint replacement), lower back (two level discectomy and fusion), and abdomen (mesh).

The Court finds Mr. Kleuchenia has been substantially inconvenienced and will continue to be inconvenienced due to his need for ongoing medical treatment. Mr. Kleuchenia testified that he worries about the recommended future surgeries and potential outcome of those procedures. He also worries about his inability to work and how he will support himself financially in the future.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes that Mr. McLeod is liable to Mr. Kleuchenia in the amount of Three Million Two Hundred Fifty Thousand and 00/100 Dollars (\$3,250,000.00).

This total is comprised of past medical damages, future medical damages, lost wages and loss of earnings, loss of personal services, past and future pain and suffering, mental anguish, loss of enjoyment of life, permanent impairment, and all other non-pecuniary aspects of his loss taking into consideration injuries to multiple body parts, the effects of his injuries, and his life expectancy of 41.16 years at the time of the Collision.

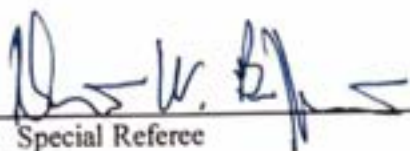
The Court further finds Mr. McLeod is entitled to a setoff pursuant to S.C. Code Ann. § 38-77-160 in the amount of \$1,000,000.00, which represents the full amount of liability coverage.

WHEREFORE, the Court finds in favor of Mr. Kleuchenia in the amount of \$3,250,000.00, less a setoff of \$1,000,000.00, for a **Net Judgment of \$2,250,000.00** with judgment to be entered and interest to begin accruing upon entry.

AND IT IS SO ORDERED.

May 29, 2024

Myrtle Beach, SC


By: Special Referee

Robert W. Buffington (SC Bar # 7825)

2411 North Oak Street, Suite 305-F

Myrtle Beach, South Carolina 29577

Tel: (843) 443-4019

Email: bobby@bufflawfirm.com

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

VIKTAR KLEUCHENIA,

Plaintiff,

v.

BRIAN MCLEOD,

Defendant.IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2021-CP- 26-04596

**ORDER ON PLAINTIFF'S MOTION
FOR COSTS AND INTEREST**

This matter is before the Court on Plaintiff's Motion for Costs and Interest ("Plaintiff's Motion"), which was timely filed on June 5, 2024, following an *Order of Judgment for Damages* entered by the Court on June 4, 2024. Plaintiff's Motion is made pursuant to Rules 54 and 68, *SCRPC*, and S.C. Code § 15-35-400. Plaintiff seeks an order from the Court taxing costs and awarding Plaintiff interest and costs owed as a consequence of failing to accept *Plaintiff's Offer of Judgment* to resolve the above captioned case before trial.

On August 17, 2023, Plaintiff filed an offer of judgment pursuant to Rule 68, *SCRPC*, for \$50,000.00, which was not accepted. A damages trial was held on April 9, 2024. On June 4, 2024, the Court entered its *Order of Judgment for Damages*, returning a judgment in favor of Plaintiff for \$2,250,000.00. As noted, Plaintiff's Motion was timely filed on June 5, 2024.

I. Costs

Rule 54, *SCRPC*, allows for specifically enumerated costs and disbursements to the prevailing party. In addition to the taxable costs permitted under Rule 54, Rule 68(b), *SCRPC*, provides that a Plaintiff may be broadly entitled to "any administrative, filing, or other court costs from the date of the offer until the entry of the judgment." *Id.*; see also *Black v. Roche Biomedical Laboratories*, 315 S.C. 223, 227, 433 S.E.2d 21, 24 (Ct. App. 1993) (The intent of Rule 68 is "to encourage settlement and avoid protracted litigation.").

Accompanied as Exhibit A to Plaintiff's Motion is the Attorney Affidavit of Jared C. Williams, Esq., setting forth the following costs:

Rule 54 Costs

• Fees of the Clerk:	\$180.32
• Fees Incurred in Service of Process:	\$85.00
• Fees for Exemplification and Copies of Papers Necessarily Obtained for Trial:	\$255.99

Rule 68 Costs

• Court Reporter Charges for Trial:	\$1,339.95
• Special Referee Charges:	\$3,420.00

The Court finds the costs set forth under Rule 54 are specifically enumerated in the language of the Rule and appropriate. Moreover, the Court finds the costs set forth under Rule 68 have been incurred after the filing of the offer of judgment and are proper under the Rule. The Court finds the costs in the amount of \$5,281.26, along with the timing the Rule 68 Costs, are supported by the Attorney Affidavit of Jared C. Williams, Esq. The Court declines to award expert witness fees incurred as taxable costs (The Special Referee charges include an additional \$300.00 charge incurred on ruling on this motion).

II. Offer of Judgment Interest

Both Rule 68, *SCRCP*, and S.C. Code § 15-35- 400 specifically state the plaintiff is entitled to eight percent (8%) interest "on the amount of the verdict or award" from the date of the offer to the entry of judgment whenever the defendant does not accept the offer of judgment and the verdict is more favorable to the plaintiff than the offer made. Moreover, the language of Rule 68 and § 15-35- 400 indicate the award of interest pursuant to each authority is not discretionary but, rather, a right as a matter of law. *See id.*; *see also Garrison v. Target Corp.*, 435 S.C. 566, 586, 869 S.E.2d 797, 808 (2022) ("We find the language of both the rule and the statute clearly and unambiguously provide that [the plaintiff] is entitled to eight percent interest on the entire amount of the verdict.").

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Plaintiff filed his offer of judgment on August 17, 2023, which was not accepted. The Court entered its *Order of Judgment for Damages* on June 4, 2024, in the amount of \$2,250,000.00, which is greater than the Offer of Judgment amount. The Court finds Plaintiff is entitled to an award of interest on the judgment amount totaling \$143,506.85, which represents eight percent (8%) annual interest over 291 days.¹

CONCLUSION

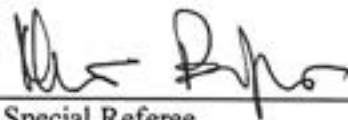
WHEREAS, the Court hereby **GRANTS** *Plaintiff's Motion for Costs and Interest*, and awards costs in the amount of \$5,281.26, pursuant to Rules 54 and 68, *SCRCP*. The Court further awards Plaintiff interest pursuant to S.C. Code § 15-35-400 and Rule 68, *SCRCP*, in the amount of \$143,506.85 as of June 4, 2024.

These amounts shall be added to the award amount set forth in the Court's *Order for Judgment of Damages* filed on June 4, 2024, and the Clerk of Court is instructed to effect entry of final judgment in the amount of **\$2,398,788.11** with interest to begin accruing upon entry.

IT IS SO ORDERED.

July 1, 2024

Myrtle Beach, SC



By: Special Referee

Robert W. Buffington (SC Bar # 7825)

2411 North Oak Street, Suite 305-F

Myrtle Beach, South Carolina 29577

Tel: (843) 443-4019

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Certificate of Electronic Notification

Recipients

Robert Buffington - Notification transmitted on 07-02-2024 03:44:32 PM.

G. Smith - Notification transmitted on 07-02-2024 03:44:31 PM.

Jared Williams - Notification transmitted on 07-02-2024 03:44:32 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2021CP2604596

Official File Stamp: 07-02-2024 03:44:25 PM

Court: CIRCUIT COURT

Common Pleas

Horry

Case Caption: Viktar Kleuchenia VS Brian McLeod

Document(s) Submitted: Special Referee/Order/Plaintiff's Motion For Costs
& Interes

Filed by or on behalf of: Bridgett Williamson

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

G. Michael Smith, Sr. for Brian McLeod

Jared Cyle Williams for Viktar Kleuchenia

Robert Walton Buffington

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Viktar Kleuchenia,

PLAINTIFF,

v.

Brian McLeod,

DEFENDANT.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2021-CP-26-04596

**ORDER DENYING TEXAS
INSURANCE COMPANY, AS
SUCCESSOR TO ONYX INSURANCE
COMPANY, AN UNDERINSURED
MOTORIST CARRIER'S MOTION
TO VACATE JUDGMENT**

This matter came before the Court on December 5, 2024, for a hearing on Texas Insurance Company's ("Texas Insurance") Motion to Vacate Judgment. Plaintiff Viktar Kleuchenia ("Plaintiff") and Texas Insurance were represented by their respective counsel. Also present at the hearing on behalf of Texas Insurance was Jeffrey Silver and Heather Murray, who were not called to testify. After careful consideration, a review of the arguments presented by counsel at the hearing, and review of the materials submitted, the Court denies Texas Insurance's Motion to Vacate Judgment.

FACTS AND PROCEDURAL HISTORY

This case arises from a motor vehicle accident occurring on July 17, 2018. (Comp. ¶ 7). Plaintiff filed suit against Defendant Brian McLeod on July 12, 2021. (Compl.) Plaintiff served Defendant via process server on July 21, 2021. (Ex. A to Plf.'s Memo. in Opp.). Plaintiff served his purported underinsured motorist carrier, Onyx Insurance Company ("Onyx"), accepted by the South Carolina Department of Insurance on August 17, 2021. (Ex. B to Plf.'s Memo. in Opp.). Onyx acknowledged service through its third-party administrator, North American Risk Services, via e-mail on August 25, 2021, but did not file an appearance or response. (Ex. C to Plf.'s Memo. in Opp.).

Plaintiff subsequently learned Onyx was assumed by Texas Insurance and Plaintiff sent additional copies of the pleadings to the South Carolina Department of Insurance on September 27, 2022. (Ex. D to Plf.'s Memo. in Opp.). Plaintiff also sent a copy of the pleadings directly to Texas Insurance via certified mail, with a return receipt signed on behalf of Texas Insurance dated September 27, 2022. (Ex. E to Plf.'s Memo. in Opp.). Texas Insurance did not file an appearance or response to the pleadings upon receipt.

After resolving claims against Defendant's liability carrier, Plaintiff filed a motion for summary judgment on the issue of liability and motion for an order of reference. (Plf.'s Mot. for Sum. Judg., April 10, 2023; Plf.'s Mot. for Ord. of Ref., April 10, 2023.). Both motions were heard and granted by the court on August 11, 2023, without service upon Texas Insurance. (Ord. for Sum. Judg., August 15, 2023; Ord. of Ref., August 15, 2023.). Plaintiff subsequently filed an offer of judgment with the Court in the amount of \$50,000.00, which represented Plaintiff's UIM coverage. (Plf.'s Off. of Judg., August 17, 2023.). No acceptance was filed.

A damages trial was set for April 9, 2024. Plaintiff filed with the court a letter directed to Texas Insurance providing notice of the damages trial. (Ex. E to Plf.'s Memo. in Opp.). No appearance was made on behalf of Texas Insurance. The Court entered an *Order of Judgment for Damages* on June 4, 2024. (Damages Ord., June 4, 2024.). Judgment was entered by the Clerk of Court on June 4, 2024, in the amount of \$2,250,000.00 ("June 4th Judgment").

Plaintiff subsequently filed a *Motion for Costs and Interest*, which was granted without a hearing, and an *Order on Plaintiff's Motion for Costs and Interest* was entered on July 2, 2024. (Plf.'s Mot. for Costs and Interest, June 5, 2024; Ord. for Costs and Interest, July 2, 2024). The Clerk of Court amended the initial June 4th Judgment to add costs and interest and entered judgment on July 2, 2024, in the amount of \$2,398,788.11. ("July 2nd Judgment").

After receiving notice of the July 2nd Judgment, Texas Insurance then filed a notice of appearance and this Motion to Vacate Judgment on September 27, 2024. (Texas Insurance's Mot. to Vacate, September 27, 2024). Texas Insurance's Motion seeks to vacate the *Order on Plaintiff's Motion for Costs and Interest* and the July 2nd Judgment.¹ In support of Texas Insurance's Motion, it files an affidavit of Jeffrey Silver, Secretary and General Counsel for Texas Insurance, who alleges as its basis for relief that Texas Insurance did not receive service of the filed offer of judgment, notice of the damages trial, or *Plaintiff's Motion for Cost and Interests*.

FINDINGS

I. TEXAS INSURANCE IS NOT ENTITLED TO RELIEF PURSUANT TO RULE 60(b), *SCRCP*.

Rule 60(b), *SCRCP*, governs relief from judgment and states, in relevant part, that "the court may relieve a party or his legal representative from final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud, misrepresentation, or other misconduct of an adverse party; . . . (4) the judgment is void. . . ."²

The standard for relief under Rule 60(b) is more rigorous than the standard to set aside default under Rule 55(c). *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607 (2009). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, fraud, misrepresentation, or other misconduct of an adverse party. *Id.* at 608. The intent of the rules is to make it more difficult for a party to obtain relief once the court has entered a judgment, which carries greater finality. *Id.* "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief." *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006).

¹ Texas Insurance's Motion does not seek relief from the initial *Order of Judgment for Damages* and June 4th Judgment.

² Rule 60(b) sets forth additional subsections as grounds for relief not applicable to Texas Insurance's Motion.

Texas Insurance argues it is entitled to relief from judgment because Plaintiff did not serve Texas Insurance directly with a copy of the offer of judgment or *Motion for Costs and Interests* which amounts to fraud, mistake, and/or makes the judgment void under Rule 60(b) as violation of its due process rights. As will be set forth below, the Court finds that Texas Insurance cannot satisfy the requirements for relief as a matter of law and denies its Motion to Vacate.

A. Texas Insurance is not entitled to relief pursuant to Rule 60(b), SCRPC, because it was served with pleadings and failed to appear in accordance with S.C. Code Ann. § 38-77-160.

S.C. Code Ann. § 38-77-160 ("Additional uninsured Motorist coverage; underinsured motorist coverage"), specifically states, in relevant part:

No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear.

S.C. Code Ann. § 38-77-160 (emphasis added).

Once served, the UIM carrier has thirty (30) days to appear in the same manner as any other defendant. See id.; see also Williams v. Selective Ins. Co. of Se., 315 S.C. 532, 534, 446 S.E.2d 402, 404 (1994) (Intent of statute is to allow carrier to appear and protect its interests.).

As previously set forth, Defendant Brian McLeod – the underinsured motorist in Plaintiff's UIM claim – was served via process server on July 21, 2021. (Ex. A to Plf.'s Memo. in Opp.). Plaintiff served his purported UIM carrier, Onyx, with pleadings through the SCDOI on August 17, 2021. (Ex. B to Plf.'s Memo. in Opp.). Onyx acknowledged service of the pleadings via e-mail on August 25, 2021. ((Ex. C to Plf.'s Memo. in Opp.). Plaintiff served additional copies of the pleading through the SCDOI directed to Texas Insurance on September 27, 2021. (Ex. D to Plf.'s Memo. in Opp.). Plaintiff also mailed a copy of the pleading via certified mail directly to Texas

Insurance, which was signed for on September 27, 2021. (Ex. E to Plf.'s Memo. in Opp.). Texas Insurance does not dispute that it was properly served with pleadings.

Despite admitting proper service was made, Texas Insurance did not appear in the case or make any response until September 27, 2024, after entry of final judgment and the filing of its Motion to Vacate. Texas Insurance failed to exercise its right to appear within thirty (30) days of service of the pleadings to defend its interests pursuant to S.C. Code Ann. § 38-77-160.

Texas Insurance argues its right to appear and protect its interest under the UIM statute is discretionary and Plaintiff's failure to continue to serve it with subsequent documents, despite its failure to appear, violates its due process rights. The Court finds the line of cases cited by Texas Insurance as violation of its due process rights to be unpersuasive. The line of cases cited by Texas Insurance analyzing lack of notice of proceedings as violation of due process all involve a party of record who has appeared and participated in the case. See, e.g., Tryon Fed. Sav. & Loan Ass'n. v. Phelps, 307 S.C. 361, 415 S.E.2d 397 (1992) (hearing granted to determine whether *pro se* "party litigant" had been served with notice of hearing and order).³ The Court is not aware of any authority cited by Texas Insurance where the court has found a violation of due process based on lack of notice of proceedings when the entity seeking relief has been properly served with pleadings and failed to appear and become a party to the case.

The court has stated in Williams v. Selective Ins. Co. of the Southeast, 446 S.E.2d 402 (1994), that "[t]he intent of § 38-77-160 requiring service of pleadings on the UIM carrier is to provide notice of the claim and give the carrier an opportunity to contest its liability for benefits."

³ Additional cases cited by Texas Insurance do not support its position for relief when it has failed to appear as a party of record in the case. See, e.g., Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002) (analyzing whether service of an order was made on a party to the case); S.C. Dep't of Soc. Servs. v. Holden, 319 S.C. 72, 459 S.E.2d 849 (1995) (denying alleged due process violation for admission of affidavit at divorce proceeding); Keowee Inv. Group, LLC v. Pickens County, 2004 S.C. App. Unpub. LEXIS 423 (Unpublished opinion) (violation of Rule 5 for failing to serve a co-defendant party of record but no prejudice); Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002) (analyzing service requirement of notice of appeal on a party of record).

Id. at 534. The statute's requirement of service affords the carrier due process by giving the carrier notice and the opportunity to appear and be heard. See id.; see also S.C. Dep't of Soc. Servs. V. Holden, at 849 (Due process does not mandate any particular form or procedure but is a flexible concept to the circumstances and interests of each case).

Additionally, our courts have repeatedly and consistently held as a matter of law that a carrier's failure to act after notice of suit does not constitute grounds for relief. See, e.g., Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 230 S.E.2d 900 (1976) (overturning trial court's order vacating judgment under Rule 60(b)[1] where carrier failed to respond to pleadings); Pilgrim v. Miller, 350, S.C. 637, 567 S.E.2d 527 (Ct. App. 2002) (Carrier has an obligation to defend, to act diligently, to take up the matter upon receipt of pleadings).

Texas Insurance was served with pleadings and given the opportunity to protect its interest but failed to do so due to its own inaction. To the extent Texas Insurance's failure to appear and participate in the case was a discretionary decision, it cannot now decide to exercise its right to protect its interest by appearing and attempting to seek relief after entry of final judgment.

B. Texas Insurance is Not Entitled to Relief Under Rule 60(b)(3) on the Basis of Fraud, Misrepresentation, or Other Misconduct of an Adverse Party and the Judgment is Not Voidable Pursuant to Rule 60(b)(4).

Texas Insurance cannot satisfy the grounds for relief under Rule 60(b)(3) based upon fraud, misrepresentation, or other misconduct of an adverse party because the Court finds that Plaintiff served all documents in accordance with the plain and clear language of Rule 5, *SCRCP*. For the same reason, the judgment is not voidable under Rule 60(b)(4), *SCRCP*.

- 1) **Texas Insurance is not entitled to relief because Plaintiff served all documents in accordance with the South Carolina Rules of Civil Procedure.**

S.C. Code Ann. § 15-35-400 and Rule 68, *SCRPC*, governs offers of judgments and each addresses service using identical language. Specifically, § 15-35-400(A) states, in relevant part:

[A]ny party may, at any time more than twenty days before the actual trial date, file with the clerk of the court a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein, for property, or to effect specified in the offer. The offeror shall give notice of the offer of judgment to the offeree's attorney, or if the offeree is not represented by an attorney, to the offeree himself, in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure.

Similarly, Rule 68(a), *SCRPC*, provides in relevant part:

Any party in a civil action, except a domestic relations action, may file, no later than twenty days before trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror for the sum stated therein, or to the effect specified in the offer. Service of the offer of judgment shall be made as provided in these rules.

Id. (emphasis added) (amended 2006).

Both § 15-35-400(B) and Rule 68 each state that an offer of judgment shall be served in accordance with the South Carolina Rules of Civil Procedure. See Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, (1994) ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.").

As such, Rule 5, *SCRPC*, ("Service and Filing of Pleadings and Other Papers") governs service of documents:

"(a) Service: When Required. Unless otherwise ordered by the court because of numerous defendants or other reason, all (1) written orders; (2) pleadings subsequent to the original summons and complaint, which includes answers, counterclaims, cross claims, replies and amended complaints; (3) *written motions*; other than ones which may be heard ex parte; (4) *written notices*; (5) discovery requests and responses; (6) appearances; (7) demands; (8) *offers of judgments*; (9)

designations of record or case; (10) grounds or exceptions on appeal; and (11) other similar papers *shall be served upon each of the parties of record....*"

Rule 5, *SCRCP*, states written motions, written notices, and offers of judgments following service of the pleadings are required to be served on "parties of record." *Id.* (emphasis added).

The Court finds the plain language of § 15-35-400(A) and Rule 68, *SCRCP*, regarding offers of judgments, each clearly state service shall be made in accordance with the South Carolina Rule of Civil Procedure. The Court further finds the plain and clear language of Rule 5, *SCRCP*, only requires service of written motions, written notices, and offers of judgments be made on parties of record to the case. Because Texas Insurance never appeared and made itself a party to the case until after entry of final judgment (despite receiving service of the pleadings), the plain and clear language of Rule 5, *SCRCP*, would not require service of documents upon Texas Insurance. Texas Insurance cites to no authority that would require service of such documents on an entity who is not a party of record to the case.

Texas Insurance admits it never availed itself as a party to the case until it filed its notice of appearance on September 27, 2024. (Texas Insurance's Mem. in Supp. at pg. 11). To require continuous service of documents upon an entity who is not a party to a case – particularly after that entity has been served with pleadings and failed to appear due to its own inaction – is inconsistent with the plain language of Rule 5, *SCRCP*. As such, there is no fraud, misrepresentation, or other misconduct of an adverse party to justify relief pursuant to Rule 60(b)(3). For the same reason, the judgment is not voidable pursuant to Rule 60(b)(4).

2) Texas Insurance's reliance on Rule 6 as grounds for relief is misplaced.

Rule 6, *SCRCP*, governs time computations for notice to parties. To the extent Texas Insurance cites to and relies on Rule 6, *SCRCP*, as grounds for relief for failing to serve any written

motion or written notice of a proceeding, Texas Insurance's reliance is misplaced because Rule 5, *SCRCP*, governs service requirements of written motions and written notices.

Regarding the written notice of the damages trial, there is evidence in the record that Texas Insurance was given notice of the damages trial based on the letter filed by Plaintiff. (Ex. E to Plf.'s Memo. in Opp.). Texas Insurance disputes the letter was received, and the Court makes no determination on the issue, because Rule 5, *SCRCP*, would not require service of a written notice upon Texas Insurance who is not a party of record to the case and not in default. Moreover, the damages trial was not set by written motion of Plaintiff, but rather scheduled at the convenience of the court with Plaintiff's cooperation, so Rule 6, *SCRCP*, would not apply.

Regarding *Plaintiff's Motion for Cost and Interest*, Rule 5, *SCRCP*, governs service of this document and would not be required upon Texas Insurance who is not a party of record to the case.

C. Texas Insurance is Not Entitled to Relief Under Rule 60(b)(1) Because There is No Mistake, Inadvertence, Surprise, or Excusable Neglect That Would Satisfy Relief.

In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: "(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. Micronics, Inc. v. S.C. Dept' Revenue, 345 S.C. 506, 548 S.E.2d 226 (Ct. App. 2001).

"A meritorious defense is more than merely a factor to consider under certain 60(b) grounds for setting aside [judgments] . . . not only must the movant make a proper showing he is entitled to relief based upon one of the specific grounds, he must also make a prima facie showing of a meritorious defense." McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 93 (Ct. App. 2008).

Texas Insurance does not cite to any mistake, inadvertence, surprise, or excusable neglect on its own behalf as grounds for relief. Rather, Texas Insurance states its right to appear pursuant to S.C. Code Ann. § 38-77-160 is discretionary and it elected not to appear. (Texas Insurance's

Mem. in Supp. at pg. 9 and 11). To the extent Texas Insurance argues some mistake by Plaintiff in failing to serve it with any documents following the pleadings, for the reasons set forth more fully above and the plain language of Rule 5, *SCRCP*, the Court finds no authority requiring such service. Texas Insurance cannot satisfy the grounds for relief pursuant to Rule 60(b)(1).

CONCLUSION

There is no dispute that Texas Insurance was served with pleadings and failed to appear until after entry of final judgment. Texas Insurance was provided notice of the case and given the opportunity to appear and protect its interest in accordance with § 38-77-160, but failed to do so due to its own inaction.

The plain language of Rule 5, *SCRCP*, does not require service of documents on an entity who is not a party to the case and the Court finds no fraud, misrepresentation, or other misconduct of an adverse party that would warrant relief pursuant to Rule 60(b)(3). For the same reason, the Court finds the judgment is not voidable pursuant to Rule 60(b)(4). Lastly, Texas Insurance cites no mistake, inadvertence, surprise, or excusable neglect to warrant relief pursuant to Rule 60(b)(1).

The Court finds that Texas Insurance cannot satisfy grounds for relief pursuant to Rule 60(b), and therefore, denies its motion to vacate judgment.

IT IS SO ORDERED.

February 27, 2025


Robert W. Buffington
Special Referee

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
VIKTAR KLEUCHENIA,	)	CASE NO.: 2021-CP- 26-04596
	)	
Plaintiff,	)	ORDER DENYING TEXAS INSURANCE
	)	COMPANY'S MOTION TO RECONSIDER
v.	)	
BRIAN MCLEOD,	)	
	)	
Defendant.	)	

This matter comes before the Court on Defendant Texas Insurance Company's Motion to Reconsider ("Motion") the Court's February 28, 2025, Order Denying Texas Insurance Company's Motion to Vacate Judgment ("Order"). Plaintiff Viktor Kleuchenia ("Plaintiff") filed a Response opposing the Motion on March 17, 2025. A hearing on the Motion was held on March 19, 2025.

For the reasons that follow, Texas Insurance Company's Motion to Reconsider is **DENIED**.

STANDARD OF REVIEW

Relief from final judgment or order is analyzed under Rule 60(b), *SCRCP*, where the moving party has the burden to present evidence proving the facts essential to relief. BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). "A party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E.2d 722, 778-9 (2004). Thus, a motion for reconsideration is "one final chance not only to call the court's attention to a possible misapprehension of an *earlier* argument, but also to revisit a *previously raised* argument." Id. (emphasis added).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

In its Motion, Texas Insurance Company ("Texas Insurance") sets forth twenty-two (22) separate grounds for reconsideration. Several of the grounds were not raised in its initial Motion

to Vacate, but the Court addresses each of Texas Insurance's grounds for reconsideration enumerated herein to correspond with each of the enumerated grounds as set forth in its Motion.

1. The Court's interpretation of S.C. Code Ann. § 38-77-160.

S.C. Code Ann. § 38-77-160, states, in relevant part, "[t]he insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear." Id.

The evidence, and Texas Insurance's own admission, establishes that it was properly served with a copy of the summons and complaint and failed to appear within thirty (30) days. Texas Insurance has provided no explanation, much less a reasonable explanation, for its failure to appear in accordance with § 38-77-160.¹ Texas Insurance only appeared after entry of judgment and has not set forth sufficient grounds for relief under Rule 60(b), *SCRCP*.

2. Texas Insurance's classification under Rule 5, *SCRCP*.

Rule 5(a), *SCRCP*, states, in relevant part:

"[u]nless ordered by the court because of numerous defendants or other reasons, all (1) written orders... (3) written motions... (4) written notices... (8) offers of judgment... shall be served upon *each of the parties of record*. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default " Id. (emphasis added).

The plain, clear, and unambiguous language of Rule 5, *SCRCP*, requires service of documents enumerated therein on "parties of record." Id. Texas Insurance did not become a party of record until filing its Notice of Appearance on September 17, 2024, despite being served with

¹ Previous orders issued by the Court also note Texas Insurance was served with pleadings and failed to appear in accordance with the UIM Statute. See Ord. Granting Plf.'s Mot. for Summ. Judg., Aug. 15, 2023 (establishing Findings of Facts that include service upon Texas Insurance and its failure to appear in the case); see also Ord. Granting Plf.'s Mot. for Ord. of Ref., p. 2, ¶ 13, Aug. 15, 2023 ("Onyx Insurance Company and/or Texas Insurance Company has not filed a notice of appearance in the case or assumed control of the defense at this time and has waived its right to appear pursuant to § 38-77-160.").

pleadings almost two years prior. Under the clear and plain language of Rule 5, *SCRCP*, service of documents enumerated therein was not required upon Texas Insurance prior to its appearance.²

3. Service of documents under Rule 5, *SCRCP*.

South Carolina Courts have addressed the proper reading and interpretation of court rules and statutes:

“When interpreting a court rule, ‘we apply the same rules of construction used in interpreting statutes. Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule.’ When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning.”

Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 509, 602 S.E.2d 99, 102 (2004) (citing Green v. Lewis TruckLines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994)).

Texas Insurance’s argument that Rule 5, *SCRCP*, only requires non-service of documents on parties in default is in direct contradiction of the plain language of the rule which clearly states service is required “upon each of the parties of record.” *Id.* If an entity is not a party of record, service is not required. Texas Insurance was served with pleadings and failed to appear or respond, and therefore, was not a party of record within the plain language of the rule.

Moreover, Texas Insurance’s argument fails to recognize the actual entry of default is a ministerial act and not dispositive of default.³ See Stark Truss Co., 360 S.C. at 509, 602 S.E.2d at 102; Thynes v. Lloyd, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (“[W]hether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit.”). To the extent a UIM carrier can default under the rules, the actual entry of default is not dispositive.

² The record contains no evidence of any pleading asserting new or additional claims for relief after the initial summons and complaint that would require service under Rule 5, *SCRCP*. The record contains evidence that notice of the damages hearing was provided to Texas Insurance.

³ To the extent Texas Insurance asserts the Court previously held it was not in default, the Court points out that it simply noted in ruling on its *Order of Judgment for Damages* that “neither Mr. McLeod nor the UIM carrier has been held in default by order of the court.” See *Ord. of Judg. for Dmgs.*, June 4, 2025. (emphasis added).

4. The Court's interpretation of Rule 5 and 6, *SCRCP*, regarding service.

Rule 5, *SCRCP*, requires service of documents enumerated therein on "each of the parties of record." Id. Rule 6, *SCRCP*, addresses timing of motions and hearings but does not alter, supplement, modify, or change when service is required under Rule 5, *SCRCP*. The Court's ruling follows the clear and plain language of the procedural rules regarding service of documents.

5. The Court's application of Rule 6, *SCRCP*.

Rule 6, *SCRCP*, addresses time computations of motions in the event service of a written motion is required under Rule 5, *SCRCP*. Pursuant to Rule 5, *SCRCP*, which specifically enumerates "written motions" as a document that is only required to be served on "parties of record," Plaintiff's Motion for Costs and Interest and supporting affidavit was not required to be served on Texas Insurance because it had not appeared at the time of filing. Id.

6. Service of an offer of judgment under Rule 5, *SCRCP*.

When reading a statute, one "should not concentrate on isolated phrases within the statute." CRFE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). "Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose." Id.

S.C. Code Ann. § 15-35-400 addresses service an offer of judgment within the language of the statute and clearly states notice shall be made "in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure." Id. Likewise, Rule 68, *SCRCP*, addresses service of an offer of judgment within the language of the rule and clearly states "[s]ervice of the offer of judgment shall be made as provided in these rules." Id.

Both § 15-35-400 and Rule 68, *SCRCP*, clearly instruct that an offer of judgment is to be served in accordance with the service requirements set forth within the South Carolina Rules of Civil Procedure. See Rule 68, *SCRCP*, Note to 2006 Amend. ("This amendment makes this provision consistent with S.C. Code Ann. § 15-35-400, which became effective July 1, 2005).

Rule 5, *SCRCP*, clearly and unambiguously controls service requirements of an offer of judgment, as it is a specifically enumerated document listed within the rule. Texas Insurance had failed to appear at the time the offer of judgment was filed and was not a party of record under Rule 5, *SCRCP*. Service of the offer of judgment on Texas Insurance was not required.⁴

7. Due Process afforded to Texas Insurance.

Due process does not mandate any particular form or procedure but is a flexible concept to the circumstances and interests of each case. See S.C. Dep't of Soc. Servs. v. Holden, 459 S.E.2d 846 (1995); see, e.g., West American Insurance Company v. Popa, 352 Md. 455, 723 A.2d (1998) (“[I]f the uninsured/underinsured motorist carrier has notice of the underlying tort suit and an opportunity to intervene, due process requirements are satisfied, and the carrier is ordinarily bound by the determinations made in the tort case.”).

Texas Insurance cites no authority supporting a violation of due process for failing to serve documents on an entity who has failed to appear after service of pleadings. Any denial of due process to Texas Insurance is its own fault for failing to appear and protect its interest. See Patel v. S. Brokers, Ltd., 277 S.C. 490, 289 S.E.2d 642 (1982) (Any alleged violation of due process for failing to appear after service “is the result of a self-inflicted wound.”).

8. The Court's application of Williams v. Selective Insurance.

“The intent of § 38-77-160 requiring service of pleadings on a UIM carrier is to provide notice of the claim and give the carrier an opportunity to contest its liability for benefits.” Williams v. Selective Ins. Co. of the Southeast, 315 S.C. 532, 446 S.E.2d 402 (1994).

Texas Insurance was properly served with pleadings, provided notice and the opportunity to appear. To the extent Texas Insurance alleges it was not required to appear in the matter because

⁴ To the extent Texas Insurance alleges Defendant Brian McLeod was not served with the offer of judgment, the offer of judgment was filed with the Court and served on him as a party of record through his attorney via electronic service.

it did not contest the admission of liability by the named Defendant, the amount of the underlying damages, or its liability for UIM benefits, ignores the fact that its failure to appear resulted in judgment which it has not provided sufficient grounds to vacate under Rule 60(b), *SCRCP*.

9. The effect of the award of damages.

The Court's ruling does not conflate an award of damages and does not enter an award directly against Texas Insurance. The judgment is entered against Brian McLeod, as an underinsured motorist. Texas Insurance's election not to appear in the case does not obligate Plaintiff to serve it with subsequent documents and does not bar Plaintiff's right to pursue claims against an underinsured motorist.

10. Abrogation of Texas Insurance's due process rights.

The Court's interpretation of the laws and procedural rules do not abrogate the constitutional rights of Texas Insurance. All laws and rules relevant herein, including but not limited to, § 38-77-160; § 15-35-400; Rule 68, *SCRCP*; Rule 5, *SCRCP*; and Rule 6, *SCRCP*; are all clear and unambiguous. These rules provide proper notice to a UIM carrier and a fair opportunity to appear and protect its interest in any case affecting its liability. Should a UIM carrier fail to appear and become a party of record in the case, the Court's rules do not require Plaintiff to continue to serve it with documents listed within Rule 5, *SCRCP*. The UIM carrier is treated the same under the laws and rules as any other entity who fails to appear after service of pleadings.

11. Texas Insurance's request for relief under Rule 60(b) that the judgment is void.

The Order addresses Texas Insurance's request for relief under Rule 60(b) that the judgment is void and concluded proper notice and an opportunity to appear was provided pursuant to § 38-77-160, and all documents were served in accordance with the requirements set forth under Rule 5, *SCRCP*. Texas Insurance's opportunity to be heard on any issues in the case was provided

upon service of the summons and complaint. To the extent Texas Insurance was not heard on any issue was due to its own inaction in failing to appear and protect its interest in the case.

12. Texas Insurance's request for relief under Rule 60(b) for failure to serve the offer of judgment.

The Order addresses Texas Insurance's request for relief under Rule 60(b) that the offer of judgment was not served on Texas Insurance, amounting to extrinsic fraud. As previously noted, an offer of judgment is a specifically enumerated document under Rule 5, *SCRPC*, that requires service on "each of the parties of record." There can be no fraud when a document is served in accordance with the clear and plain language of the applicable court rule.

13. The Court's interpretation of § 15-35-400 and Rule 68, *SCRPC*.

The Order addresses service of the offer of judgment under § 15-35-400 and Rule 68, *SCRPC*, outlining the clear and plain language in each that an offer of judgment is to be served in accordance with the South Carolina Rules of Civil Procedure (i.e., Rule 5, *SCRPC*). Had Texas Insurance appeared upon service of the summons and complaint it could have accepted any offer of judgment filed with the Court. See Goodson v. Amer. Bankers Ins. Co. of Fla., 395 S.C. 400, 403, 368 S.E.2d 687, 690 (1988) ("[A] party has a duty to monitor the progress of his case.").

14. Texas Insurance's assertion of a "meritorious defense."

The Order addresses a "meritorious defense" presented by Texas Insurance and concluded it has not set forth any reasonable explanation for its failure to appear or respond upon service of the summons and complaint. Texas Insurance alleges it elected not to appear and that it would have timely paid UIM benefits under the policy upon notice of the damages award. Texas Insurance's argument fails to consider that its election not to appear resulted in judgment and it has provided no reasonable basis to vacate judgment under Rule 60(b), *SCRPC*.

15. Violation of due process for failure to serve offer of judgment.

The offer of judgment was filed and served in accordance with § 15-35-400; Rule 68, *SCRCP*; and corresponding Rule 5, *SCRCP*. There is no violation of due process where pleadings were served on Texas Insurance – who either elected not to appear or simply failed to act – and all subsequent documents were served in accordance with the applicable laws and procedural rules.

16. Sufficiency of notice of trial on damages.⁵

Rule 6, *SCRCP*, applies to a motion that is required to be served under Rule 5, *SCRCP*, and the scheduling of a hearing on that motion. The damages trial was not set by written motion of Plaintiff, and thus, Rule 6, *SCRCP*, does not apply. Even if the damages trial were set by written motion, service of the written motion would not be required under Rule 5, *SCRCP*.

Moreover, Rule 5(a) provides “notice of any trial or hearing on unliquidated damages shall also be given to parties in default.” *Id.* To the extent Texas Insurance is a defaulting party, Rule 55(b)(2) states “[p]ursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action.” *Id.*

On April 1, 2024, Plaintiff filed with the Court a letter addressed to Texas Insurance providing notice of the damages trial scheduled for April 9, 2024.⁶ The mailing of the letter provides eight (8) days of notice to Texas Insurance. Thus, the evidence in the record shows that

⁵ Texas Insurance’s initial Motion to Vacate does not seek any relief from the Court’s initial *Order of Judgment for Damages*. *See* Texas Insurance Co.’s Memo. in Supp. of Mot. to Vacate, p. 12 (“Texas does not seek to relitigate through this motion [to vacate] either the liability of the Defendant in this case, nor the damages awarded under the initial damages order entered on June 4, 2024).

⁶ The contents of the letter set forth the name of the case along with the case caption, the date and time for the damages trial, the name of the presiding special referee, along with the contact information for Plaintiff’s counsel. The letter provides sufficient information to inform Texas Insurance of the scheduled proceeding.

Texas Insurance, despite its failure to appear, was provided as much notice as a defaulting party who has actually appeared.⁷

17. Application of S.C. Department of Insurance Bulletin 4-89.

To the extent Texas Insurance cites to S.C. Department of Insurance Bulletin 4-89, the Court makes no determination of its precedential value. Nevertheless, even considering Texas Insurance's argument that a UIM carrier has the right, but not the ordinary duty, to appear or defend in a lawsuit against a putative at-fault driver does not mean it can wait and appear after judgment to seek relief without satisfying Rule 60(b), *SCRCP*. If Texas Insurance wanted to appear and protect its interest in this case – as it now seems to try and do – then it should have appeared and protected its interest prior to any judgment.

18. Service of an offer of judgment pursuant to § 15-35-400.

To the extent Texas Insurance alleges § 15-35-400 requires service on the “offeree himself,” it is only focusing on an isolated phrase and failing to read the statute in its entirety. See CRFE, LLC v. Greenville Cnty. Assessor, 395 S.C. at 74, 716 S.E.2d at 881 (statutes must be read as a whole). The statute clearly and unambiguously states “[t]he offeror shall give notice of the offer of judgment ... to the offeree himself, *in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure.*” Id. Texas Insurance fails to consider the remainder of the sentence within the statute. Moreover, the “service rules” contemplated and referenced within § 15-35-400 refers to Rule 5, *SCRCP*, requiring service of “offers of judgment . . . upon each of the parties of record.” Id.

19. Plaintiff's recovery of the damages award.

⁷ Under Rule 55(b)(2), *SCRCP*, when a party in default has appeared in the case, the moving party must provide notice of the motion or application for judgment at least 3 days prior to the hearing on such application. Under Rule 55(b)(2), *SCRCP*, when a party in default has not appeared, notice of the hearing or trial on damages must be provided via first-class mail. The first-class mailing of Plaintiff's letter on April 1, 2024, providing notice of the damages trial on April 8, 2024, provides three (3) days of notice plus an additional five (5) days for mailing under Rule 6(e), *SCRCP*.

The Order addresses an award of damages against Brian McLeod, as an underinsured motorist. In this action, Texas Insurance was provided notice and an opportunity to protect its interest. The Court makes no determination of what effect the judgment has between Plaintiff and Texas Insurance.

20. Abrogation of contractual rights pursuant to § 15-35-400.

The Order and award of damages assesses damages suffered by Plaintiff at the hands of Brian McLeod, an underinsured motorist. In assessing Plaintiff's damages, the Court makes no determination of what effect the judgment has between Plaintiff and Texas Insurance.

21. Inconsistency of ruling under Rule 5, *SCRPC*.

The Court's ruling does not make any inconsistency in the status of Texas Insurance. To the extent a UIM carrier can be in default under Rule 5(a), no service is required on Texas Insurance. Even if a UIM carrier cannot be considered a defaulting party under Rule 5(a), *SCRPC*, service is still not required upon Texas Insurance because it was not a party of record.

22. Personal and subject matter jurisdiction for awarding damages.

"The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give notice of the action and an opportunity to appear and defend." White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 8-9, 753 S.E. 2d 537, 541 (2014).

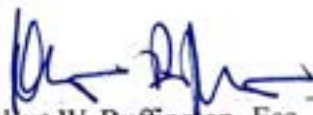
The record establishes Plaintiff properly served Texas Insurance, as an underinsured motorist carrier, evidenced by the filed acceptance of service from the S.C. Department of Insurance. Texas Insurance admits it was properly served. The judgment was entered against Brian McLeod, as an underinsured motorist. Brian McLeod and Texas Insurance were properly served and the Court has personal jurisdiction over all parties and subject matter jurisdiction over all issues. See Broome v. Watts, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995) (UIM carrier "steps into the shoes of the underinsured motorist" to pay damages in the event of liability.)

CONCLUSION

For the reasons set forth above, exercising its sound discretion in reconsidering the issues set forth in Texas Insurance's Motion to Reconsider, the Court stands by its prior determination and Texas Insurance's Motion to Reconsider is **DENIED**.

AND IT IS SO ORDERED.

May
April 2, 2025


Robert W. Buffington, Esq.
Special Referee

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

VIKTAR KLEUCHENIA,

Plaintiff,

v.

BRIAN MCLEOD,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2021-CP- _____

SUMMONS
(Jury Trial Demanded)

TO: THE ABOVE-NAMED DEFENDANT

YOU ARE HEREBY SUMMONED and required to answer the Complaint contained herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/Jared C. Williams

Jared C. Williams

S.C. Bar No. 100806

P.O. Box 403

Mount Pleasant, SC 29465

(843) 991-6528

jcwilliams@charlestonlaw.edu.

Attorney for the Plaintiff

July 12, 2021

Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
VIKTAR KLEUCHENIA,	)	CASE NO.: 2021-CP- _____
	)	
Plaintiff,	)	COMPLAINT
	)	(Jury Trial Demanded)
v.	)	
	)	
BRIAN MCLEOD,	)	
	)	
Defendant.	)	

Plaintiff Viktor Kleuchenia, by and through his undersigned counsel, hereby files and serves this Complaint against Defendant Brian McLeod and in support thereof, alleges and complains of the following:

THE PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Viktor Kleuchenia, at all times relevant herein, was a resident of Horry County, South Carolina.
2. Upon information and belief, Defendant Brian McLeod, at all times relevant herein, was a resident of the State of Michigan.
3. The action arises from a motor vehicle collision that occurred on or about July 17, 2018, in Horry County, South Carolina.
4. Plaintiff's claims are in excess of the jurisdictional threshold of this Court.
5. Jurisdiction and venue are proper in this Court because Plaintiff was a resident of Horry County, South Carolina, and the accident occurred in Horry County, South Carolina.

FACTUAL ALLEGATIONS

6. Plaintiff realleges and incorporates the preceding paragraphs as though repeated verbatim herein.

7. On July 17, 2018, Plaintiff Viktor Kleuchenia was operating a motor vehicle traveling North-bound on Highway 17 in Horry County, South Carolina.

8. A motor vehicle being operated by Defendant Brian McLeod was traveling west on 52nd Avenue North.

9. Defendant Brian McLeod attempted to turn south onto Highway 17 and, in doing so, pulled out directly into Plaintiff's path, causing the front of Plaintiff's vehicle to collide with the side of Defendant's vehicle.

10. Defendant Brian McLeod stated and acknowledged that he did not see Plaintiff Viktor Kleuchenia's vehicle causing the collision in question.

11. Defendant Brian McLeod was at fault for the accident.

12. Plaintiff Viktor Kleuchenia did not cause or contribute to the collision in any manner and Plaintiff had no ability to avoid or prevent the collision.

13. As a result of the collision, Plaintiff Viktor Kleuchenia suffered painful, traumatic and permanent injuries throughout his body. Plaintiff Viktor Kleuchenia has incurred, and will continue to incur in the future, medical expenses, and has suffered, and will continue to suffer general damages such as physical and mental pain and suffering, emotional anguish, loss wages, and a loss of enjoyment of life, along with considerable medical bills and inconvenience, all of which he is entitled to be compensate for as a direct and proximate cause of Defendant's actions described above.

CAUSES OF ACTION
(Negligence *Per Se*, Negligence, Recklessness)

14. Plaintiff realleges and incorporates the preceding paragraphs as though repeated verbatim herein.

15. Defendant Brian McLeod was negligent *per se*, negligent, careless, reckless and grossly

negligent in one or more of the following particulars:

- a. In causing his vehicle to impact Plaintiff's vehicle;
- b. In failing to regard a traffic device;
- c. In failing to yield to Plaintiff's right-of-way;
- d. In operating a vehicle in a distracted manner;
- e. In failing to keep a proper lookout;
- f. In failing to operate a vehicle in a manner to avoid a collision;
- g. In failing to maintain proper control over his vehicle;
- h. In failing to properly brake his vehicle to avoid a collision;
- i. In operating his vehicle without regard to traffic or traffic devices then and there existing;
- j. In failing to take any evasive action by means to keep from causing the collision;
- k. In failing to obey applicable ordinances and the statutory and common laws of the State of South Carolina;
- l. In failing to use the degree of caution and care that a reasonable driver would have used under the same or similar circumstances then and there existing;
- m. In operating his motor vehicle in whole or in part in a careless, reckless, willful and wanton disregard for others, and;
- n. In otherwise being negligent *per se*, negligent, grossly negligent and reckless as further discovery may reveal.

All or part of which were the direct and proximate cause of the injuries and damages suffered by Plaintiff.

16. Plaintiff Viktor Kleuchenia is entitled to a judgment against the Defendant to compensate him for the damages and injuries sustained.

WHEREFORE, Plaintiff Viktor Kleuchenia demands a jury trial and prays this Honorable Court for judgment against Defendant Brian McLeod for: (a) actual and consequential damages; (b) punitive damages; (c) pre-judgment interest; (d) costs and attorney's fees in instituting this action; and (e) for such other and further legal and equitable relief as this Honorable Court may deem just and proper.

Respectfully submitted,

s/Jared C. Williams
jcwilliams@charlestonlaw.edu
S.C. Bar No. 100806
P.O. Box 403
Mt. Pleasant, SC 29465
(843) 991-6528
Attorney for Viktor Kleuchenia

July 12, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO.: 2021-CP-26-04596
Viktar Kleuchenia,	)	
	)	
Plaintiff,	)	ANSWER OF THE DEFENDANT
	)	TO PLAINTIFF'S COMPLAINT
vs.	)	(Jury Trial Demanded)
	)	
Brian McLeod,	)	
	)	
Defendant.	)	
	)	

TO: PLAINTIFF AND JARED C. WILLIAMS, ESQ., ATTORNEY FOR PLAINTIFF

The Defendant, answering the Complaint of the Plaintiff herein, alleges as follows:

FOR A FIRST DEFENSE

1. Denies each and every allegation of the Complaint not hereinafter specifically admitted, qualified or explained.

2. As to Paragraph Nos. 1 and 4 of the Complaint, the Defendant does not have information sufficient to form a belief as to the truth of the allegations of Paragraph Nos. 1 and 4 of the Complaint and therefore denies the same and demands strict proof thereof.

3. Admits the allegations contained in Paragraph Nos. 2 and 3 of the Complaint.

4. As to Paragraph No. 5 of the Complaint, the Defendant admits that jurisdiction is proper in this Court because the accident occurred in Horry County, South Carolina, but the

Defendant does not have information sufficient to form a belief as to the truth of the remaining allegations of Paragraph No. 5 of the Complaint and therefore denies the same and demands strict proof thereof.

4. As to Paragraph Nos. 7, 8, 9, 10 and 12 of the Complaint, the Defendant admits that an accident occurred, but denies the remaining allegations of Paragraph Nos. 7, 8, 9, 10 and 12 of the Complaint and demands strict proof thereof.

5. Denies the allegations contained in Paragraph Nos. 11, 13, 15 and 16 of the Complaint, including all subparts, and demands strict proof thereof.

AS A SECOND AND AFFIRMATIVE DEFENSE

6. Realleges each and every allegation of the First Defense as if set forth herein verbatim.

7. An award of punitive damages against Defendant, directly or by indemnification, under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, §3 of the South Carolina Constitution in that:

- a. The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;
- b. Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. Any award of punitive damages based upon the wealth of the Defendant violates due process guarantees;
- d. The jury's unfettered power to award punitive damages in

any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;

- e. Even if it would be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and
- f. The Plaintiff's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, §3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Defendant.

AS A THIRD AND AFFIRMATIVE DEFENSE

8. Realleges each and every allegation of the First and Second Defense as if set forth herein verbatim.

9. Pursuant to S.C. Code § 15-32-530, any punitive damages award should be capped according to the provisions of said statute. There is no evidence that the Defendant intended harm to the Plaintiff; there is no evidence that the Defendant pled guilty to or was convicted of a felony arising out of the accident; and there is no evidence that Defendant acted or failed to act while under the influence of drugs or alcohol, or that Defendant's judgment was substantially impaired at the time of the accident.

WHEREFORE, having fully answered the Complaint of the Plaintiff herein, the Defendant prays that the Complaint be dismissed, for costs assessed against the Plaintiff and for such other and further relief as this Court may deem necessary, just and proper.

THOMPSON & HENRY, P.A.

s/G. Michael Smith
G. Michael Smith
SC Bar No. 5255
1300 Second Ave., 3rd Floor
Post Office Box 1740
Conway, SC 29528
Phone: (843) 248-5741
Fax: (834) 248-5112
msmith@thompsonlaw.com

ATTORNEYS FOR THE DEFENDANT

Conway, South Carolina

July 26, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	CASE NO.: 2021-CP- 26-04596
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	
	)	PLAINTIFF’S OFFER OF JUDGMENT
v.	)	
	)	
BRIAN MCLEOD,	)	
	)	
Defendant.	)	

TO: G. MICHAEL SMITH, ATTORNEY FOR DEFENDANT BRIAN MCCLEOD

PLEASE TAKE NOTICE that Plaintiff Viktor Kleuchenia (“Plaintiff”), by and through his undersigned counsel, in an attempt to settle this matter pursuant to South Carolina Code of Law § 15-35-400 and Rule 68 of the South Carolina Rules of Civil Procedure, hereby makes the following Offer of Judgment to Defendant Brian McLeod (“Defendant”).

In consideration for a judgment against Defendant in the amount of Eight-Hundred Thousand Dollars and Zero Cents (\$800,000.00), Plaintiff will discharge any and all claims and causes of action against Defendant arising out of the circumstances described in Plaintiff’s Complaint.

If this Offer of Judgment is not accepted within twenty (20) days after notification of this offer or prior to or on the tenth (10th) day before the actual trial date, whichever date occurs first, this Offer shall be considered rejected and withdrawn. If deemed rejected or withdrawn, this Offer shall not be admissible as evidence at the trial of this case except in a proceeding to determine costs.

Pursuant to S.C. Code Ann. § 15-35-400(B) and Rule 68, *SCRCP*, if Defendant does not accept this Offer of Judgment and Plaintiff obtains a verdict or determination at least as favorable

as this Offer, Plaintiff shall seek to recover from Defendant: (1) any administrative, filing, or other court costs; (2) litigation expenses including the cost of depositions and expert witness fees; (3) annual interest compounded on the amount of any verdict or award at the Court's current rate; and (4) any other recoverable monies this Court deems appropriate. However, in making this Offer of Judgment, in the event Defendant does not accept, Plaintiff does not waive his right to seek any greater remedies that may be available to him than those set forth in S.C. Code Ann. § 15-35-400 and Rule 68, *SCRCP*, including, without limitation, his right to seek recovery of pre-judgment interest at a rate greater than eight percent annum, ensuing damages pursuant to *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 286, 170 S.E. 346 (1933), and any such other relief as the Court deems appropriate. Furthermore, any acceptance of this Offer of Judgment by Defendant would not preclude Plaintiff from pursuing additional benefits through his underinsured motorist coverage or any other available benefits he may be entitled to under the law.

Within twenty (20) days after notification, or at least ten (10) days prior to trial, whichever date is earlier, the Defendant named herein, or his defense counsel may file with the Clerk of Court a written acceptance of this Offer of Judgment and serve it upon Plaintiff in accordance with the South Carolina Rules of Civil Procedure.

Respectfully submitted,

s/Jared C. Williams
Jared C. Williams, Esquire
SC Bar No.: 100806
P.O. Box 403
Mount Pleasant, SC 29465
(843) 991-6528 – Telephone
(803) 429-3393 – Mobile
jared@williamslawsc.com
Attorney for Plaintiff

January 17, 2023
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
VIKTAR KLEUCHENIA,)
Plaintiff,)
v.)
BRIAN MCLEOD,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2021-CP- 26-04596

CERTIFICATE OF SERVICE

This is to certify that copies of Plaintiff's Offer of Judgment has been served upon the foregoing parties this 17th day of January 2023

G. Michael Smith, Esq.
Thomson & Henry, P.A.
Via electronic filing

Brian McLeod
7327 Hillsboro Court
Canton, MI 48187
Via first-class mail

Respectfully submitted,



Jared C. Williams
S.C. Bar No. 100806
P.O. Box 403
Mount Pleasant, SC 29465
(843) 991-6528 – Office
(803) 429-3393 – Mobile
jared@williamslawsc.com
Attorney for the Plaintiff

January 17, 2023
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO.: 2021-CP-26-04596
Viktar Kleuchenia,	)	
	)	
Plaintiff,	)	ACCEPTANCE OF PLAINTIFF'S
	)	OFFER OF JUDGMENT
vs.	)	
	)	
Brian McLeod,	)	
	)	
Defendant.	)	
_____	)	

TO: PLAINTIFF AND JARED C. WILLIAMS, ESQ., ATTORNEY FOR PLAINTIFF

PLEASE TAKE NOTICE the Defendant, by and through its undersigned attorney, pursuant to S.C. Code Ann. Section 15-35-400 and Rule 68 of the SCRCP, hereby accepts the Plaintiff's Offer of Judgment for the total sum of Eight Hundred Thousand and 00/100 (\$800,000.00), as full compromise and settlement of Plaintiff's claim against the Defendant Brian McLeod.

THOMPSON & HENRY, P.A.

s/G. Michael Smith
G. Michael Smith
SC Bar No. 5255
1300 Second Ave., 3rd Floor
Conway, SC 29528
Phone: (843) 248-5741
Fax: (834) 248-5112
msmith@thompsonlaw.com

ATTORNEYS FOR THE DEFENDANT

Conway, South Carolina

January 25, 2023

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Viktar Kleuchenia,

Plaintiff,

vs.

Brian McLeod,

Defendant.

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 C/A NO.: 2021-CP-26-04596

SATISFACTION OF JUDGMENT
AMOUNT: \$800,000.00

On January 17, 2023, Plaintiff filed and served an Offer of Judgment in this matter, specifically reserving Plaintiff's right to pursue Underinsured Motorist benefits. On January 25, 2023, Defendant filed and served an Acceptance of Plaintiff's Offer of Judgment. Defendant has now tendered to Plaintiff the sum of \$800,000 in satisfaction of said judgment. Plaintiff acknowledges that the agreed sum has been paid and agrees that any judgment entered as above described has been paid; that the lien of the said judgment is hereby declared forever discharged and satisfied; and that due to the payment and satisfaction of the judgment, the Clerk of Court for Horry County is hereby authorized and directed to cancel said judgment upon the records of said County, all while preserving Plaintiff's rights to pursue any claim he has to Underinsured Motorist benefits.

Witness the due execution hereof by the owner and holder of
said judgment this 23 day of ^{February VK}~~January~~ 2023.

Signed, Sealed and Delivered

in the presence of:

Misty White
[Signature]

[Signature]
VIKTAR KLEUCHENIA

STATE OF SOUTH CAROLINA)
) PROBATE
 COUNTY OF HORRY)

Personally appeared before me the undersigned witness who, being by me duly sworn, says that (s)he was present and saw the above named Viktor Kleuchenia, sign, seal and as his act and deed, deliver the foregoing Satisfaction of Judgment; and that (s)he with the other subscribing witness witnessed the execution thereof.

Mary W. Win
 Witness

SWORN TO before me this 23rd
 day of February, 2023.

Kelsey Swiney (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 12/17/2029

KELSEY SWINEY
 Notary Public - State of South Carolina
 My Commission Expires December 17, 2029

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	CASE NO.: 2022-CP- 26-04596
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	
	)	PLAINTIFF’S OFFER OF JUDGMENT
v.	)	FOR UIM BENEFITS
	)	
BRIAN MCLEOD,	)	
	)	
Defendant.	)	

PLEASE TAKE NOTICE that Plaintiff Viktor Kleuchenia (“Plaintiff”), by and through his undersigned counsel, in an attempt to settle this matter pursuant to South Carolina Code of Law § 15-35-400 and Rule 68 of the South Carolina Rules of Civil Procedure, hereby makes the following Offer of Judgment to Texas Insurance Company as assignee of Onyx Insurance Company, as UIM carrier (“UIM Carrier”).

In consideration for a judgment in the amount of Fifty-Thousand Dollars and Zero Cents (\$50,000.00), Plaintiff will discharge all claims and causes of action against Defendant and/or UIM Carrier, arising out of the circumstances described in Plaintiff’s Complaint.

If this Offer of Judgment is not accepted within twenty (20) days after notification or prior to or on the tenth (10th) day before the actual trial date, whichever date occurs first, this Offer shall be considered rejected and withdrawn. If deemed rejected or withdrawn, this Offer shall not be admissible as evidence at the trial of this case except in a proceeding to determine costs.

Pursuant to S.C. Code Ann. § 15-35-400(B) and Rule 68, *SCRCP*, if UIM Carrier does not accept this Offer of Judgment and Plaintiff obtains a verdict or determination at least as favorable as this Offer, Plaintiff shall seek to recover from UIM Carrier: (1) any administrative, filing, or other court costs; (2) litigation expenses including, but not limited to, the cost of depositions and

expert witness fees, mediation fees, and/or fees of any special referee; (3) annual interest compounded on the amount of any verdict or award at the Court's current rate; and (4) any other recoverable monies this Court deems appropriate. However, in making this Offer of Judgment, in the event UIM Carrier does not accept, Plaintiff does not waive his right to seek any greater remedies that may be available to him than those set forth in S.C. Code Ann. § 15-35-400 and Rule 68, *SCRCP*, including, without limitation, his right to seek recovery of pre-judgment interest at a rate greater than eight percent annum, ensuing damages pursuant to *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 286, 170 S.E. 346 (1933) or *Nichols v. State Farm Mut. Auto Ins. Co.*, 279 S.C. 336 S.E.2d 616 (1983), and any such other relief as the Court deems appropriate. Furthermore, any acceptance of this Offer of Judgment by UIM Carrier would not preclude Plaintiff from pursuing additional benefits he may be entitled to under the law.

Within twenty (20) days after notification, or at least ten (10) days prior to trial, whichever date is earlier, UIM Carrier, or its defense counsel may file with the Clerk of Court a written acceptance of this Offer of Judgment and serve it upon Plaintiff in accordance with the South Carolina Rules of Civil Procedure.

Respectfully submitted,

s/Jared C. Williams
Jared C. Williams, Esquire
SC Bar No.: 100806
P.O. Box 403
Mount Pleasant, SC 29465
(843) 991-6528 – Telephone
(803) 429-3393 – Mobile
jared@williamslawsc.com
Attorney for Plaintiff

August 17, 2023
Charleston, South Carolina

Certificate of Electronic Notification

Recipients

Robert Buffington - Notification transmitted on 08-17-2023 10:27:52 AM.

G. Smith - Notification transmitted on 08-17-2023 10:27:52 AM.

Jared Williams - Notification transmitted on 08-17-2023 10:27:52 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2021CP2604596

Official File Stamp: 08-17-2023 10:27:35 AM

Court: CIRCUIT COURT

Common Pleas

Horry

Case Caption: Viktor Kleuchenia VS Brian McLeod

Document(s) Submitted: Offer Of Judgment

Filed by or on behalf of: Jared Cyle Williams

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

G. Michael Smith, Sr. for Brian McLeod

Jared Cyle Williams for Viktor Kleuchenia

Robert Walton Buffington

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Viktar Kleuchenia,

PLAINTIFF,

v.

Brian McCleod,

DEFENDANT.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2021-CP-26-04596

NOTICE OF APPEARANCE

TO: JARED C. WILLIAMS, ATTORNEY FOR PARTIES ABOVE-NAMED:

The undersigned, as attorneys for Texas Insurance Company, hereby notify and advise this Court, the parties above-named and their attorneys that they are appearing in this action on behalf of Texas Insurance Company, a purported underinsured motorist carrier for the Plaintiff, and that in making this appearance specifically reserves and does not waive any rights pursuant to its purported policy of insurance if applicable or to challenge its existence, applicability, or amount of any insurance coverage. This filing and all activities in this case are undertaken under a reservation of rights which it may have under S.C. Code ANN §38-77-160 (1976, as amended) or otherwise. further requests that copies of all pleadings and discovery heretofore exchanged between the parties be served upon the address given below.

Upon information and belief, the Defendant has already appeared and answered, and no further pleading is required. The answer of the Defendant is incorporated herein by reference.

GRIFFITH, FREEMAN & LIIPFERT, LLC

By:



Michael D. Freeman (SC Bar #71260)
600 Monson Street
PO Drawer 570
Beaufort, SC 29901
843-521-4242
843-521-4247 (fax)
mfreeman@griffithfreeman.com

ATTORNEYS FOR ONYX-TEXAS
INSURANCE COMPANY

September 17, 2024
Beaufort, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Robert W. Buffington, Esq., Special Referee

Civil Action No. 2021-CP-20-04596

Viktar Kleuchenia..... Respondent,

v.

Brian McLeod..... Appellant.

NOTICE OF APPEAL

Texas Insurance Company, as successor of Onyx Insurance Company, Inc., a Risk Retention Group timely appeals the Order Denying Texas Insurance Company's Motion to Reconsider. (Exhibit A)

In compliance with SCACR 201, the Appellant has the right to Appeal the ruling and Order handed down on May 5, 2025, by Special Referee, Robert W. Buffington, Esq. This Appeal shall be filed within thirty (30) day as mandated by SCACR 203, with Notice given to the appropriate parties as set forth in the Proof of Service.

GRIFFITH, FREEMAN & LIIPFERT, LLC

By: s/Michael D. Freeman
Michael D. Freeman (SC Bar #71260)
600 Monson Street
PO Drawer 570
Beaufort, SC 29901
843-521-4242
843-521-4247 (fax)
mfreeman@griffithfreeman.com

ATTORNEYS FOR TEXAS INSURANCE
COMPANY, AS SUCCESSOR OF ONYX
INSURANCE COMPANY, INC., A RISK
RETENTION GROUP

May 5, 2025
Beaufort, South Carolina

CERTIFICATE OF SERVICE

On May 5, 2025, I served *Notice of Appeal* pursuant to Rule 5, SCRCP by depositing it in the United States mail, with postage prepaid, and addressed as follows:

Jared C. Williams
Law Office of Jared C. Williams
PO Bix 403
Mount Pleasant, SC 29456
jared@williamslawsc.com

G. Michael Smith, Sr.
Thompson Law
1300 Second Ave., 3rd Floor
PO Box 1740
Conway, SC 29528
msmith@thompsonlaw.com

Robert Walton Buffington
Buffington Law Firm, LLC
PO Box 6
Pawleys Island, SC 29585
bobby@bufflawfirm.com

Re:
2021-CP-26-04596

s/Anna J Beckham
Anna J Beckham

Beaufort, South Carolina

EXHIBIT A

Order Denying Texas Insurance Company's Motion to Reconsider

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
VIKTAR KLEUCHENIA,	)	CASE NO.: 2021-CP- 26-04596
	)	
Plaintiff,	)	ORDER DENYING TEXAS INSURANCE
	)	COMPANY'S MOTION TO RECONSIDER
v.	)	
BRIAN MCLEOD,	)	
	)	
Defendant.	)	

This matter comes before the Court on Defendant Texas Insurance Company's Motion to Reconsider ("Motion") the Court's February 28, 2025, Order Denying Texas Insurance Company's Motion to Vacate Judgment ("Order"). Plaintiff Viktor Kleuchenia ("Plaintiff") filed a Response opposing the Motion on March 17, 2025. A hearing on the Motion was held on March 19, 2025.

For the reasons that follow, Texas Insurance Company's Motion to Reconsider is **DENIED**.

STANDARD OF REVIEW

Relief from final judgment or order is analyzed under Rule 60(b), *SCRCP*, where the moving party has the burden to present evidence proving the facts essential to relief. *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). "A party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 722, 778-9 (2004). Thus, a motion for reconsideration is "one final chance not only to call the court's attention to a possible misapprehension of an *earlier* argument, but also to revisit a *previously raised* argument." *Id.* (emphasis added).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

In its Motion, Texas Insurance Company ("Texas Insurance") sets forth twenty-two (22) separate grounds for reconsideration. Several of the grounds were not raised in its initial Motion

to Vacate, but the Court addresses each of Texas Insurance's grounds for reconsideration enumerated herein to correspond with each of the enumerated grounds as set forth in its Motion.

1. The Court's interpretation of S.C. Code Ann. § 38-77-160.

S.C. Code Ann. § 38-77-160, states, in relevant part, "[t]he insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear." Id.

The evidence, and Texas Insurance's own admission, establishes that it was properly served with a copy of the summons and complaint and failed to appear within thirty (30) days. Texas Insurance has provided no explanation, much less a reasonable explanation, for its failure to appear in accordance with § 38-77-160.¹ Texas Insurance only appeared after entry of judgment and has not set forth sufficient grounds for relief under Rule 60(b), *SCRPC*.

2. Texas Insurance's classification under Rule 5, *SCRPC*.

Rule 5(a), *SCRPC*, states, in relevant part:

"[u]nless ordered by the court because of numerous defendants or other reasons, all (1) written orders... (3) written motions... (4) written notices... (8) offers of judgment... shall be served upon *each of the parties of record*. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default " Id. (emphasis added).

The plain, clear, and unambiguous language of Rule 5, *SCRPC*, requires service of documents enumerated therein on "parties of record." Id. Texas Insurance did not become a party of record until filing its Notice of Appearance on September 17, 2024, despite being served with

¹ Previous orders issued by the Court also note Texas Insurance was served with pleadings and failed to appear in accordance with the UIM Statute. See Ord. Granting Plf.'s Mot. for Summ. Judg., Aug. 15, 2023 (establishing Findings of Facts that include service upon Texas Insurance and its failure to appear in the case); see also Ord. Granting Plf.'s Mot. for Ord. of Ref., p. 2, ¶ 13, Aug. 15, 2023 ("Onyx Insurance Company and/or Texas Insurance Company has not filed a notice of appearance in the case or assumed control of the defense at this time and has waived its right to appear pursuant to § 38-77-160.").

pleadings almost two years prior. Under the clear and plain language of Rule 5, *SCRCP*, service of documents enumerated therein was not required upon Texas Insurance prior to its appearance.²

3. Service of documents under Rule 5, *SCRCP*.

South Carolina Courts have addressed the proper reading and interpretation of court rules and statutes:

“When interpreting a court rule, ‘we apply the same rules of construction used in interpreting statutes. Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule.’ When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning.”

Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 509, 602 S.E.2d 99, 102 (2004) (citing Green v. Lewis TruckLines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994)).

Texas Insurance’s argument that Rule 5, *SCRCP*, only requires non-service of documents on parties in default is in direct contradiction of the plain language of the rule which clearly states service is required “upon each of the parties of record.” *Id.* If an entity is not a party of record, service is not required. Texas Insurance was served with pleadings and failed to appear or respond, and therefore, was not a party of record within the plain language of the rule.

Moreover, Texas Insurance’s argument fails to recognize the actual entry of default is a ministerial act and not dispositive of default.³ See Stark Truss Co., 360 S.C. at 509, 602 S.E.2d at 102; Thynes v. Lloyd, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (“[W]hether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit.”). To the extent a UIM carrier can default under the rules, the actual entry of default is not dispositive.

² The record contains no evidence of any pleading asserting new or additional claims for relief after the initial summons and complaint that would require service under Rule 5, *SCRCP*. The record contains evidence that notice of the damages hearing was provided to Texas Insurance.

³ To the extent Texas Insurance asserts the Court previously held it was not in default, the Court points out that it simply noted in ruling on its *Order of Judgment for Damages* that “neither Mr. McLeod nor the UIM carrier has been held in default by order of the court.” See *Ord. of Judg. for Dmgs.*, June 4, 2025. (emphasis added).

4. The Court's interpretation of Rule 5 and 6, *SCRCP*, regarding service.

Rule 5, *SCRCP*, requires service of documents enumerated therein on "each of the parties of record." Id. Rule 6, *SCRCP*, addresses timing of motions and hearings but does not alter, supplement, modify, or change when service is required under Rule 5, *SCRCP*. The Court's ruling follows the clear and plain language of the procedural rules regarding service of documents.

5. The Court's application of Rule 6, *SCRCP*.

Rule 6, *SCRCP*, addresses time computations of motions in the event service of a written motion is required under Rule 5, *SCRCP*. Pursuant to Rule 5, *SCRCP*, which specifically enumerates "written motions" as a document that is only required to be served on "parties of record," Plaintiff's Motion for Costs and Interest and supporting affidavit was not required to be served on Texas Insurance because it had not appeared at the time of filing. Id.

6. Service of an offer of judgment under Rule 5, *SCRCP*.

When reading a statute, one "should not concentrate on isolated phrases within the statute." CRFE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). "Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose." Id.

S.C. Code Ann. § 15-35-400 addresses service an offer of judgment within the language of the statute and clearly states notice shall be made "in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure." Id. Likewise, Rule 68, *SCRCP*, addresses service of an offer of judgment within the language of the rule and clearly states "[s]ervice of the offer of judgment shall be made as provided in these rules." Id.

Both § 15-35-400 and Rule 68, *SCRCP*, clearly instruct that an offer of judgment is to be served in accordance with the service requirements set forth within the South Carolina Rules of Civil Procedure. See Rule 68, *SCRCP*, Note to 2006 Amend. ("This amendment makes this provision consistent with S.C. Code Ann. § 15-35-400, which became effective July 1, 2005).

Rule 5, *SCRCP*, clearly and unambiguously controls service requirements of an offer of judgment, as it is a specifically enumerated document listed within the rule. Texas Insurance had failed to appear at the time the offer of judgment was filed and was not a party of record under Rule 5, *SCRCP*. Service of the offer of judgment on Texas Insurance was not required.⁴

7. Due Process afforded to Texas Insurance.

Due process does not mandate any particular form or procedure but is a flexible concept to the circumstances and interests of each case. See S.C. Dep't of Soc. Servs. v. Holden, 459 S.E.2d 846 (1995); see, e.g., West American Insurance Company v. Popa, 352 Md. 455, 723 A.2d (1998) (“[I]f the uninsured/underinsured motorist carrier has notice of the underlying tort suit and an opportunity to intervene, due process requirements are satisfied, and the carrier is ordinarily bound by the determinations made in the tort case.”).

Texas Insurance cites no authority supporting a violation of due process for failing to serve documents on an entity who has failed to appear after service of pleadings. Any denial of due process to Texas Insurance is its own fault for failing to appear and protect its interest. See Patel v. S. Brokers, Ltd., 277 S.C. 490, 289 S.E.2d 642 (1982) (Any alleged violation of due process for failing to appear after service “is the result of a self-inflicted wound.”).

8. The Court's application of Williams v. Selective Insurance.

“The intent of § 38-77-160 requiring service of pleadings on a UIM carrier is to provide notice of the claim and give the carrier an opportunity to contest its liability for benefits.” Williams v. Selective Ins. Co. of the Southeast, 315 S.C. 532, 446 S.E.2d 402 (1994).

Texas Insurance was properly served with pleadings, provided notice and the opportunity to appear. To the extent Texas Insurance alleges it was not required to appear in the matter because

⁴ To the extent Texas Insurance alleges Defendant Brian McLeod was not served with the offer of judgment, the offer of judgment was filed with the Court and served on him as a party of record through his attorney via electronic service.

it did not contest the admission of liability by the named Defendant, the amount of the underlying damages, or its liability for UIM benefits, ignores the fact that its failure to appear resulted in judgment which it has not provided sufficient grounds to vacate under Rule 60(b), *SCRCP*.

9. The effect of the award of damages.

The Court's ruling does not conflate an award of damages and does not enter an award directly against Texas Insurance. The judgment is entered against Brian McLeod, as an underinsured motorist. Texas Insurance's election not to appear in the case does not obligate Plaintiff to serve it with subsequent documents and does not bar Plaintiff's right to pursue claims against an underinsured motorist.

10. Abrogation of Texas Insurance's due process rights.

The Court's interpretation of the laws and procedural rules do not abrogate the constitutional rights of Texas Insurance. All laws and rules relevant herein, including but not limited to, § 38-77-160; § 15-35-400; Rule 68, *SCRCP*; Rule 5, *SCRCP*; and Rule 6, *SCRCP*; are all clear and unambiguous. These rules provide proper notice to a UIM carrier and a fair opportunity to appear and protect its interest in any case affecting its liability. Should a UIM carrier fail to appear and become a party of record in the case, the Court's rules do not require Plaintiff to continue to serve it with documents listed within Rule 5, *SCRCP*. The UIM carrier is treated the same under the laws and rules as any other entity who fails to appear after service of pleadings.

11. Texas Insurance's request for relief under Rule 60(b) that the judgment is void.

The Order addresses Texas Insurance's request for relief under Rule 60(b) that the judgment is void and concluded proper notice and an opportunity to appear was provided pursuant to § 38-77-160, and all documents were served in accordance with the requirements set forth under Rule 5, *SCRCP*. Texas Insurance's opportunity to be heard on any issues in the case was provided

upon service of the summons and complaint. To the extent Texas Insurance was not heard on any issue was due to its own inaction in failing to appear and protect its interest in the case.

12. Texas Insurance's request for relief under Rule 60(b) for failure to serve the offer of judgment.

The Order addresses Texas Insurance's request for relief under Rule 60(b) that the offer of judgment was not served on Texas Insurance, amounting to extrinsic fraud. As previously noted, an offer of judgment is a specifically enumerated document under Rule 5, *SCRCP*, that requires service on "each of the parties of record." There can be no fraud when a document is served in accordance with the clear and plain language of the applicable court rule.

13. The Court's interpretation of § 15-35-400 and Rule 68, *SCRCP*.

The Order addresses service of the offer of judgment under § 15-35-400 and Rule 68, *SCRCP*, outlining the clear and plain language in each that an offer of judgment is to be served in accordance with the South Carolina Rules of Civil Procedure (i.e., Rule 5, *SCRCP*). Had Texas Insurance appeared upon service of the summons and complaint it could have accepted any offer of judgment filed with the Court. See *Goodson v. Amer. Bankers Ins. Co. of Fla.*, 395 S.C. 400, 403, 368 S.E.2d 687, 690 (1988) ("[A] party has a duty to monitor the progress of his case.").

14. Texas Insurance's assertion of a "meritorious defense."

The Order addresses a "meritorious defense" presented by Texas Insurance and concluded it has not set forth any reasonable explanation for its failure to appear or respond upon service of the summons and complaint. Texas Insurance alleges it elected not to appear and that it would have timely paid UIM benefits under the policy upon notice of the damages award. Texas Insurance's argument fails to consider that its election not to appear resulted in judgment and it has provided no reasonable basis to vacate judgment under Rule 60(b), *SCRCP*.

15. Violation of due process for failure to serve offer of judgment.

The offer of judgment was filed and served in accordance with § 15-35-400; Rule 68, *SCRPC*; and corresponding Rule 5, *SCRPC*. There is no violation of due process where pleadings were served on Texas Insurance – who either elected not to appear or simply failed to act – and all subsequent documents were served in accordance with the applicable laws and procedural rules.

16. Sufficiency of notice of trial on damages.⁵

Rule 6, *SCRPC*, applies to a motion that is required to be served under Rule 5, *SCRPC*, and the scheduling of a hearing on that motion. The damages trial was not set by written motion of Plaintiff, and thus, Rule 6, *SCRPC*, does not apply. Even if the damages trial were set by written motion, service of the written motion would not be required under Rule 5, *SCRPC*.

Moreover, Rule 5(a) provides “notice of any trial or hearing on unliquidated damages shall also be given to parties in default.” *Id.* To the extent Texas Insurance is a defaulting party, Rule 55(b)(2) states “[p]ursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action.” *Id.*

On April 1, 2024, Plaintiff filed with the Court a letter addressed to Texas Insurance providing notice of the damages trial scheduled for April 9, 2024.⁶ The mailing of the letter provides eight (8) days of notice to Texas Insurance. Thus, the evidence in the record shows that

⁵ Texas Insurance’s initial Motion to Vacate does not seek any relief from the Court’s initial *Order of Judgment for Damages*. *See* Texas Insurance Co.’s Memo. in Supp. of Mot. to Vacate, p. 12 (“Texas does not seek to relitigate through this motion [to vacate] either the liability of the Defendant in this case, nor the damages awarded under the initial damages order entered on June 4, 2024).

⁶ The contents of the letter set forth the name of the case along with the case caption, the date and time for the damages trial, the name of the presiding special referee, along with the contact information for Plaintiff’s counsel. The letter provides sufficient information to inform Texas Insurance of the scheduled proceeding.

Texas Insurance, despite its failure to appear, was provided as much notice as a defaulting party who has actually appeared.⁷

17. Application of S.C. Department of Insurance Bulletin 4-89.

To the extent Texas Insurance cites to S.C. Department of Insurance Bulletin 4-89, the Court makes no determination of its precedential value. Nevertheless, even considering Texas Insurance's argument that a UIM carrier has the right, but not the ordinary duty, to appear or defend in a lawsuit against a putative at-fault driver does not mean it can wait and appear after judgment to seek relief without satisfying Rule 60(b), *SCRCP*. If Texas Insurance wanted to appear and protect its interest in this case – as it now seems to try and do – then it should have appeared and protected its interest prior to any judgment.

18. Service of an offer of judgment pursuant to § 15-35-400.

To the extent Texas Insurance alleges § 15-35-400 requires service on the “offeree himself,” it is only focusing on an isolated phrase and failing to read the statute in its entirety. See CRFE, LLC v. Greenville Cnty. Assessor, 395 S.C. at 74, 716 S.E.2d at 881 (statutes must be read as a whole). The statute clearly and unambiguously states “[t]he offeror shall give notice of the offer of judgment ... to the offeree himself, *in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure.*” Id. Texas Insurance fails to consider the remainder of the sentence within the statute. Moreover, the “service rules” contemplated and referenced within § 15-35-400 refers to Rule 5, *SCRCP*, requiring service of “offers of judgment . . . upon each of the parties of record.” Id.

19. Plaintiff's recovery of the damages award.

⁷ Under Rule 55(b)(2), *SCRCP*, when a party in default has appeared in the case, the moving party must provide notice of the motion or application for judgment at least 3 days prior to the hearing on such application. Under Rule 55(b)(2), *SCRCP*, when a party in default has not appeared, notice of the hearing or trial on damages must be provided via first-class mail. The first-class mailing of Plaintiff's letter on April 1, 2024, providing notice of the damages trial on April 8, 2024, provides three (3) days of notice plus an additional five (5) days for mailing under Rule 6(e), *SCRCP*.

The Order addresses an award of damages against Brian McLeod, as an underinsured motorist. In this action, Texas Insurance was provided notice and an opportunity to protect its interest. The Court makes no determination of what effect the judgment has between Plaintiff and Texas Insurance.

20. Abrogation of contractual rights pursuant to § 15-35-400.

The Order and award of damages assesses damages suffered by Plaintiff at the hands of Brian McLeod, an underinsured motorist. In assessing Plaintiff's damages, the Court makes no determination of what effect the judgment has between Plaintiff and Texas Insurance.

21. Inconsistency of ruling under Rule 5, *SCRPC*.

The Court's ruling does not make any inconsistency in the status of Texas Insurance. To the extent a UIM carrier can be in default under Rule 5(a), no service is required on Texas Insurance. Even if a UIM carrier cannot be considered a defaulting party under Rule 5(a), *SCRPC*, service is still not required upon Texas Insurance because it was not a party of record.

22. Personal and subject matter jurisdiction for awarding damages.

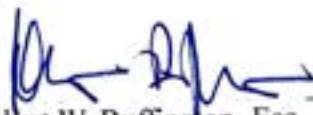
"The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give notice of the action and an opportunity to appear and defend." White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 8-9, 753 S.E. 2d 537, 541 (2014).

The record establishes Plaintiff properly served Texas Insurance, as an underinsured motorist carrier, evidenced by the filed acceptance of service from the S.C. Department of Insurance. Texas Insurance admits it was properly served. The judgment was entered against Brian McLeod, as an underinsured motorist. Brian McLeod and Texas Insurance were properly served and the Court has personal jurisdiction over all parties and subject matter jurisdiction over all issues. See Broome v. Watts, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995) (UIM carrier "steps into the shoes of the underinsured motorist" to pay damages in the event of liability.)

CONCLUSION

For the reasons set forth above, exercising its sound discretion in reconsidering the issues set forth in Texas Insurance's Motion to Reconsider, the Court stands by its prior determination and Texas Insurance's Motion to Reconsider is **DENIED**.

AND IT IS SO ORDERED.


Robert W. Buffington, Esq.
Special Referee

May
April 2, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	CASE NO.: 2024-CP- _____
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	
	)	SUMMONS
v.	)	
	)	
TEXAS INSURANCE COMPANY, as	)	
successor of Onyx Insurance Company, Inc.,)	)	
a Risk Retention Group,	)	
	)	
Defendant.	)	

TO: THE ABOVE-NAMED DEFENDANT AND MICHAEL FREEMAN, ESQ., ATTORNEY FOR TEXAS INSURANCE COMPANY

YOU ARE HEREBY SUMMONED and required to answer the Complaint contained herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/Jared C. Williams
Jared C. Williams
S.C. Bar No. 100806
P.O. Box 403
Mount Pleasant, SC 29465
(843) 991-6528
jared@williamslawsc.com
Attorney for the Plaintiff

September 30, 2024
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	CASE NO.: 2024-CP- _____
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	(Jury Trial Demanded)
v.	)	
	)	
TEXAS INSURANCE COMPANY, as	)	
successor of Onyx Insurance Company, Inc.,	)	
a Risk Retention Group,	)	
	)	
Defendant.	)	

TO: THE ABOVE-NAMED DEFENDANT AND MICHAEL FREEMAN, ESQ.,
ATTORNEY FOR TEXAS INSURANCE COMPANY

Plaintiff Viktor Kleuchenia (“Plaintiff”), by and through his undersigned counsel, hereby files and serves this Complaint against Defendant Texas Insurance Company, as successor of Onyx Insurance Company, Inc., a Risk Retention Group (“Defendant”), and in support thereof, alleges and complains of the following:

THE PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, at all times relevant herein, was a resident of Horry County, South Carolina.
2. Upon information and belief, Defendant is an insurance company that is licensed and does business in South Carolina, insures persons and corporate entities residing in South Carolina, and receives revenue therefrom.
3. That at the relevant times referenced herein and at the time of the acts and/or omissions that are subject of this litigation, Defendant’s employees, agents, administrators, and/or representatives were acting within the course and scope of their employment with Defendant and acting as its agent in fact.

4. Defendant is subject to this Court's subject matter and personal jurisdiction, and venue is proper in this Court.

FACTUAL ALLEGATIONS

5. Plaintiff realleges and incorporates the preceding paragraphs as though repeated verbatim herein.

6. A valid contract for insurance was entered between Plaintiff and Onyx Insurance Company, Inc., a Risk Retention Group ("Onyx"), with effective dates of coverage from March 29, 2018, to March 29, 2019, Policy No. OIC-SC-0001119-02. ("Subject Policy"). **(Exhibit A).**

7. By execution of an Assumption and Indemnity Agreement between Defendant and Onyx, Defendant agreed to indemnify Onyx and assume all rights, duties, obligations, and liabilities as carrier/insurer under the Subject Policy. **(Exhibit B).**

8. On July 17, 2018, Plaintiff was injured in a motor vehicle accident with Brian McLeod resulting in a lawsuit filed on July 12, 2021, in Horry County Court of Common Pleas, identified as Civil Action Number 2021-CP-26-04596 ("Subject Loss" or "Underlying Case").

9. On or about July 21, 2021, Plaintiff served Brian McLeod with the pleadings via personal service in the Underlying Case. **(Exhibit C).**

10. On or about August 17, 2021, Plaintiff served the pleadings in the Underlying Case through the South Carolina Department of Insurance directed to Onyx. **(Exhibit D).**

11. North American Risk Services, a third-party administrator acting on behalf of and/or as agent of Defendant and/or its predecessor, acknowledged receipt of the pleadings in the Underlying Case but did not retain counsel or forward the pleadings to an attorney to appear in the Underlying Case.

12. On September 22, 2022, Plaintiff sent an additional copy of the pleadings to the South Carolina Department of Insurance directed to Defendant and mailed a copy of the pleadings to Defendant via certified mail to address 10805 Old Mill Road, Omaha, NE 68154, and received a signed returned receipt. **(Exhibit E)**.

13. A notice of appearance or responsive pleading was still never filed in the Underlying Case on behalf of Defendant or any underinsured motorist (UIM) carrier.

14. On August 15, 2023, the Court granted summary judgment on the issue of liability against Brian McLeod and entered an Order of Reference to determine damages.

15. On April 9, 2024, a bench trial was held before a special referee where no appearance was made on behalf of Defendant or any underinsured motorist (UIM) carrier.

16. On June 4, 2024, an *Order of Judgment for Damages* was entered by the court resulting in judgment against Brian McLeod in the amount of \$2,250,00.00. **(Exhibit F)**.

17. On July 2, 2024, an *Order on Plaintiff's Motion for Costs and Interest* was entered against Brian McLeod, with an amended judgment entered in the amount of \$2,398,788.11.

18. On August 20, 2024, Plaintiff sent Defendant a copy of the judgment requesting payment and satisfaction thereof by September 9, 2024.

19. On September 4, 2024, Defendant responded to Plaintiff's request stating it never issued a policy of insurance to Plaintiff, stating it was never served with any pleadings in the Underlying Case, and requesting additional information to process Plaintiff's claim.

20. On September 9, 2024, Defendant sent a follow up correspondence to Plaintiff stating Plaintiff had \$25,000.00 in underinsured motorist (UIM) coverage under the Subject Policy and tendered payment of \$25,000.00 on behalf of "Onyx/Texas Insurance Company."

FOR A FIRST CAUSE OF ACTION**Bad Faith/Breach of the Covenant of Good Faith and Fair Dealing**

21. Plaintiff realleges and incorporates the preceding paragraphs as though repeated verbatim herein.

22. Plaintiff entered a valid and mutually binding contract of insurance with Onyx, providing underinsured motorist (UIM) benefits to Plaintiff for the Subject Loss.

23. Onyx subsequently entered an Assumption and Indemnity Agreement with Defendant, wherein Defendant agreed to assume all obligations and liabilities as the carrier under the Subject Policy; this agreement was evidenced by an executed Assumption Certificate which was made part of the Subject Policy.

24. Defendant is the responsible carrier for the Subject Loss under the Subject Policy.

25. Defendant owed Plaintiff a duty of good faith and fair dealing and a duty to reasonably investigate and process Plaintiff's claim for benefits under the Subject Policy.

26. That Defendant, acting unreasonably and in bad faith, failed and continue to fail to pay Plaintiff monies due to Plaintiff, thereby breaching their duty of good faith and fair dealing that arose under the Subject Policy in the following particulars:

- a. In failing to conduct a reasonable investigation of the claim and/or lawsuit;
- b. In failing to adequately respond to service of pleadings;
- c. In failing to monitor the case following service of pleadings;
- d. In failing to retain counsel to appear in the case upon service of pleadings;
- e. In negligently investigating and handling the claim and/or lawsuit;
- f. In failing to have in place adequate policies and procedures to conduct a reasonable investigation and handling of the claim and/or lawsuit;
- g. In failing to follow its policies and procedures regarding the investigation and handling of the claim and/or lawsuit;

- h. In failing to pay insurance benefits owed under the Subject Loss;
- i. In requesting information from its insured in processing or paying the claim to which the insurer already has in its possession or reasonable access thereto;
- j. In transferring duties and obligations under the Subject Policy without Plaintiff's consent;
- k. In failing to transfer duties and obligations under the Subject Policy with reasonable care as to not cause harm to Plaintiff;
- l. In unreasonably denying coverage and/or failing to pay benefits reasonably due under the Subject Policy;
- m. In misrepresenting the amount of available coverage under the Subject Policy; and
- n. In other and further particulars as the evidence at trial may show.

27. As a direct and proximate result of the actions of Defendant, Plaintiff has suffered actual and consequential damages and is entitled to extra-contractual damages, interest, attorney's fees, costs, and other consequential damages not limited to the Subject Policy, including but not limited to, the judgment entered against the underinsured motorist which Plaintiff is legally entitled to recover. Moreover, Plaintiff is entitled to punitive damages against Defendant.

FOR A SECOND CAUSE OF ACTION
Breach of Contract

28. Plaintiff realleges and incorporates the preceding paragraphs as though repeated verbatim herein.

29. The Subject Policy constitutes a valid and binding policy of insurance, which Plaintiff initially entered with Onyx and was subsequently assumed by Defendant by execution of the Assumption and Indemnity Agreement which was made part of the Subject Policy, creating a contractual relationship between Plaintiff and Defendant.

30. The Subject Loss is a covered loss under the Subject Policy, and Plaintiff has performed all conditions precedent to making a claim under the Subject Policy.

31. Plaintiff paid certain amounts under the Subject Policy and Defendant contractually agreed to provide coverage for losses, including the Subject Loss.

32. As a direct and proximate result of the actions of Defendant, Plaintiff has suffered actual and consequential damages and is entitled to extra-contractual damages, interest, attorney's fees, costs, and other consequential damages not limited to the Subject Policy, including but not limited to, the judgment entered against the underinsured motorist which Plaintiff is legally entitled to recover. Moreover, Plaintiff is entitled to punitive damages against Defendant.

FOR A THIRD CAUSE OF ACTION

Breach of Contract Accompanied by Fraud and/or Misrepresentations

33. Plaintiff realleges and incorporates the preceding paragraphs as though repeated verbatim herein.

34. The Subject Policy constitutes a valid and binding policy of insurance, which Plaintiff initially entered with Onyx and was subsequently assumed by Defendant by execution of the Assumption and Indemnity Agreement which was made part of the Subject Policy, creating a contractual relationship between Plaintiff and Defendant TIC.

35. Defendant breached its contract with Plaintiff by misrepresenting certain information in the handling of the claim, including but not limited to:

- a. Misrepresenting that the pleadings had never been served and/or received in the Underlying Case;
- b. Misrepresenting that a contract was never entered and/or a contractual relationship with Plaintiff never existed;
- c. Misrepresenting that certain information was not received or reasonably in Defendant's possession or control in processing Plaintiff's claim;

- d. Misrepresenting the amount of available coverage under the Subject Policy; and
- d. In otherwise misrepresenting facts, circumstances, and information in the processing of Plaintiff's claim for benefits under the Subject Policy.

36. Defendant breached its contract with Plaintiff by failing to pay benefits reasonably owed under the Subject Policy.

37. Defendant's breach is accompanied by misrepresentations and/or fraudulent intentions to deny benefits reasonably owed to Plaintiff under the Subject Policy.

38. As a direct and proximate result of the actions of Defendant, Plaintiff has suffered actual and consequential damages and is entitled to extra-contractual damages, interest, attorney's fees, costs, and other consequential damages not limited to the Subject Policy, including but not limited to, the judgment entered against the underinsured motorist which Plaintiff is legally entitled to recover. Moreover, Plaintiff is entitled to punitive damages against Defendant.

FOR A FOURTH CAUSE OF ACTION
Third-Party Beneficiary to a Contract

39. Plaintiff realleges and incorporates the preceding paragraphs as though repeated verbatim herein.

40. Onyx and Defendant entered into an Assumption and Indemnification Agreement, which constitutes an agreement and contract to provide benefits under the Subject Policy.

41. The Assumption and Indemnification Agreement between Onyx and Defendant was specifically for the providing of benefits under the Subject Policy to Plaintiff.

42. Defendant breached its contractual agreement to provide benefits under the Subject Policy as the insurer/carrier.

43. As a result of Defendant's breach, Plaintiff was denied benefits reasonably owed as a third-party beneficiary to the contract entered between Defendant and Onyx.

44. As a direct and proximate result of the actions of Defendant, Plaintiff has suffered actual and consequential damages and is entitled to extra-contractual damages, interest, attorney's fees, costs, and other consequential damages not limited to the Subject Policy, including but not limited to, the judgment entered against the underinsured motorist which Plaintiff is legally entitled to recover. Moreover, Plaintiff is entitled to punitive damages against Defendant.

FOR A FIFTH CAUSE OF ACTION
Restitution/Unjust Enrichment/Quantum Meruit

45. Plaintiff realleges and incorporates the preceding paragraphs as though repeated verbatim herein.

46. Plaintiff purchased an insurance policy with Onyx, which Defendant assumed as the insurer/carrier and received the benefit of premiums.

47. Defendant accepted and retained the benefit of the Subject Policy and premiums without extending the value of the benefit to Plaintiff by failing to reasonably process his claim and failing to pay benefits as described above.

48. As a direct and proximate result of Defendant's conduct, Plaintiff has incurred actual and consequential damages that would have otherwise been covered by the Subject Policy.

49. Defendant has thereby been unjustly enriched at the expense of Plaintiff and equity requires Defendant make restitution in the amount of the policy premium payments plus interest and consequential damages to place Plaintiff in the same position he would have been in had Defendants not engaged in the wrongful conduct described herein.

PRAYER FOR RELIEF

50. Plaintiff realleges and incorporates the preceding paragraphs as though repeated verbatim herein.

51. Defendant's employees, agents, administrators, and/or representatives were acting within the course and scope of their employment with Defendant and/or acting as its agent in fact and Defendant is vicariously liable for any of their acts and/or omissions.

52. The acts and/or omissions described above were conducted individually, vicariously, and/or jointly and severally.

WHEREFORE, Plaintiff prays this Honorable Court for the following:

- a. a jury trial against Defendant;
- b. actual, consequential, and extra-contractual damages, including but not limited to the judgment entered against the underinsured motorist in the Underlying Case;
- c. punitive damages;
- d. pre and post-judgment interest, including but not limited to interest on the judgment in the Underlying Case;
- e. costs and attorney's fees in instituting this action, including but not limited to taxable costs pursuant to Rule 55, *SCRCP*, and attorney's fees pursuant to S.C. Code Ann. § 38-59-50; and
- f. for such other and further legal and equitable relief as this Honorable Court may deem just and proper.

Respectfully submitted,

s/Jared C. Williams
jared@williamslawsc.com
 S.C. Bar No. 100806
 P.O. Box 403
 Mt. Pleasant, SC 29465
 (843) 991-6528 – Office
 (803) 429-3393 – Direct
Attorney for Plaintiff

September 30, 2024
 Charleston, South Carolina

EXHIBIT A
(Policy No. OIC-SC-0001119-02)

POLICY NUMBER: OIC-SC-0001119-02

BUSINESS AUTO POLICY DECLARATIONS

ONYX INSURANCE COMPANY, INC. A RISK RETENTION GROUP

One Nashville Place
150 Fourth Avenue, North
Suite 1100
Nashville, TN 37219

Mailing Address:
237 Kearny Street, #143
San Francisco, CA 94108
Phone: 917-822-4238

ITEM ONE

NAMED INSURED: Viktor Kleuchenia (Imperial Cab)

MAILING ADDRESS: 617 36th Ave N
#G
Myrtle Beach, SC 29577

Note: The insurance policy is issued by Onyx Insurance Company Inc., a Risk Retention Group. Your Risk Retention Group may not be subject to all of the insurance laws or regulations of your State. State insurance insolvency guaranty funds are not available for your Risk Retention Group. Read your policy and its coverage conditions thoroughly.

POLICY PERIOD:

FROM: 03/29/2018 TO: 03/29/2019
(AT 12:01 STANDARD TIME AT YOUR MAILING ADDRESS)

BUSINESS DESCRIPTION: Taxi Service

IN RETURN FOR THE PAYMENT OF PREMIUM, AND SUBJECT TO ALL TERMS OF THIS POLICY AND THE INFORMATION PROVIDED ON THE SIGNED APPLICATION, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

SCHEDULE OF COVERAGES AND COVERED AUTOS

This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "Autos" shown as covered autos, which must be reported to the Company prior to effecting coverage.

COVERAGES	COVERED AUTOS	LIMIT	PREMIUM
BODILY INJURY AND PROPERTY DAMAGE LIABILITY	7	\$25,000.00 Per Person / \$50,000.00 Per Accident / \$25,000.00 Property Damage	<u>\$2,480.00</u>
PERSONAL INJURY PROTECTION (OR EQUIVALENT NO FAULT COVERED)	<u>EXCLUDED</u>	<u>N/A</u>	<u>N/A</u>
UNINSURED MOTORIST	7	\$25,000.00 Per Person / \$50,000.00 Per Accident / \$0.00 Property Damage	<u>INCLUDED</u>
UNDERINSURED MOTORIST	7	\$25,000.00 Per Person / \$50,000.00 Per Accident / \$0.00 Property Damage	<u>INCLUDED</u>
DEDUCTIBLE	7	<u>N/A</u>	<u>N/A</u>

PREMIUM

Commercial Automobile Bodily Injury & Property Damage Liability	<u>\$2,480.00</u>
Uninsured Motorist Coverage	<u>INCLUDED</u>
Total	<u>\$2,480.00</u>

PREMIUM SHOWN IS PAYABLE(minimum 25% of premium is earned at inception):

\$496.00 at inception and 10 installments of \$198.40 each. Installments are due thirty (30) days thereafter prior to the due date.

ITEM TWO: SCHEDULE COVERED AUTOS

DESCRIPTION (LIST ADDITIONAL VEHICLES ON SEPARATE SCHEDULE)					
MAKE	YEAR	MODEL	BODY TYPE	SERIAL NUMBER	VIN
See Schedule On File With the Carrier					

ITEM THREE: LIABILITY DEDUCTIBLE

The Liability Coverage is changed as follows:

The damages including loss adjustment expense caused in any one "accident" that would otherwise be payable under the Liability Coverage will be reduced by the Liability Deductible as shown in the Coverage Schedule on page two above prior to the application of the Limit of Insurance provision. Such Deductible upon invoicing will be paid immediately to the Carrier, and failure to pay will be subject to policy cancellation.

ITEM FOUR: COVERED AUTOS

The Coverage afforded hereunder only covers such automobiles as scheduled with the Carrier.

ITEM FIVE: COVERED DRIVERS

The coverage afforded hereunder is limited to those named drivers as scheduled with the Carrier.

Endorsements Attached to this Policy:

Countersigned:

Date:



Jason Sears - Secretary
(Authorized Representative)

Date: 03/29/2018

ONYX BUSINESS AUTO POLICY COVERAGE

Named Insured: Viktor Kleuchenia (Imperial Cab)

Policy Number: OIC-SC-0001119-02

Inception Date: 03/29/2018

Expiration Date: 03/29/2019

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section VI – Definitions.

NOTE:

The insurance policy is issued by Onyx Insurance Company Inc., A Risk Retention Group. Your Risk Retention Group may not be subject to all of the insurance laws or regulations of your State. State insurance insolvency guaranty funds are not available for your Risk Retention Group. Read your policy and its coverage conditions thoroughly.

SECTION I - COVERED AUTOS

Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a Coverage on the Declarations designate the only "autos" that are covered "autos". It is further agreed and understood that **You** have to advise the Company and receive written confirmation prior to effecting coverage for any covered automobiles to be scheduled as a covered automobile.

A. Description of Covered Auto Designation Symbols:

Symbol		Description of Covered Autos Designation Symbols
1	Any "Autos"	You must notify prior to and receive written confirmation from the Company for coverage to be effected.
2	Owned "Autos" Only	Only those "autos" you own and any "trailers" you don't own while attached to power units you own. This includes those "autos" you acquire ownership of after the policy begins.
3	Owned Private Passenger "Autos" Only	Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins.
4	Owned "Autos" Other Than Private Passenger "Autos" Only	Only those "autos" you own that are not of the private passenger type (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins.
5	Owned "Autos" Subject To No-Fault	Only those "autos" you own that are required to have No-Fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have No-Fault benefits in the state where they are licensed or principally garaged.
6	Owned "Autos" Subject To A Compulsory Uninsured Motorists Law	Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement.
7	"Autos" Specified On Schedule	Only those "autos" described on the schedule and any "trailers" you don't own while attached to power units you own. You must notify prior to and receive written confirmation from the Company for coverage to be effected.

8	Hired "Autos" Only	Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent, or borrow from any of your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households.
9	Non-owned "Autos" Only	Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees", partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business.

B. Owned Autos You Acquire After the Policy Begins

If Symbols 1, 2, 3, 4, 5, or 6 are entered next to a coverage in Item Two of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.

C. Temporary Substitute Autos

If Liability Coverage is provided by this Coverage Form, the following types of vehicles are also covered "autos" for Liability Coverage:

Any "auto" you own while used as a temporary substitute for a covered "auto" you own that is out of service because of its: Breakdown, Repair, Servicing or "Loss" or Destruction.

SECTION II - LIABILITY COVERAGE

A. Coverage

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

We will also pay all sums an "insured" legally must pay as a "covered pollution cost or expense" to which this insurance applies caused by an "accident" and resulting from the ownership, maintenance or use of covered "autos". However we will only pay for the "covered pollution cost or expense" if there is either "bodily injury" or "property damage" to which this insurance applies that is caused by the same "accident."

We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of insurance has been exhausted by payment of judgments or settlements.

1) Who Is An Insured

The following are "insureds":

- a. You for any covered "auto";
- b. Anyone else whom you have advised the Company and received formal approval in writing from the Company while using with your permission a covered "auto" you own, hire, or borrow **EXCEPT**
 - i. The owner or anyone else from whom you hire or borrow a covered "auto" unless you have advised the Company in writing prior to effecting coverage and received written confirmation from the Company of the acceptance of coverage.
 - ii. Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.
 - iii. Someone using a covered "auto" while he or she is working in a business of servicing, repairing, "autos" unless that is part of your business is yours.
 - iv. Anyone other than your "employees", partners (if you are a partnership), members (if you are a limited liability company) or a lessee or borrower or any of their "employees", while moving property to or from a covered "auto".
 - v. A partner (if you are a partnership) or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.
 - vi. Anyone liable for the conduct of an "insured" described above.
 - vii. "Permissive users" who are users of a covered auto, other than "insureds", who are not approved in writing by the Company. Coverage for permissive users is subject to reduction to statutory minimums (see NOTICE OF REDUCTION IN COVERAGE on Page 4).

2) Coverage Extensions**a. Supplementary Payments**

We will pay for the "insured" at the Company's option:

- i. All costs taxed against the "insured" in any "suit" against the "insured" we defend.
- ii. All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" against the "insured" we defend but our duty to pay interest ends we have paid or offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

These payments will not reduce the Limit of Insurance.

b. Out of State Coverage Extensions

While a covered "auto" is away from the state where it is licensed we will:

- i. Increase the Limit of Insurance for Liability Coverage to meet the limits specified by a compulsory or financial responsibility law of the jurisdiction where the covered "auto" is being used. This extension does not apply to the limit or limits specified by any law governing motor carriers of passengers or property.
- ii. Provide the minimum amounts and types of other coverages, such as no-fault required of out of state vehicles by the jurisdiction where the covered "auto" is being used.

We will not pay anyone more than once for the same elements of loss because of these extensions.

B. Exclusions

This insurance does not apply to any of the following:

1) Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured".

2) Contractual

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

- a. Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement and such contract has been provided to the Company and You have received formal approval by the Company.

3) Workers Compensation

Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers compensation, disability benefits or unemployment compensation law or any similar law.

4) Employee Indemnification and Employer's Liability

"Bodily injury" to:

- i. An "employee" of the "insured" arising out of and in the course of:
 - a. Employment by the "insured", or
 - b. Performing the duties related to the conduct of the "insured's" business; or
- ii. The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph a. above

This exclusion applies:

- a. Whether the "insured" may be liable as an employer or in any other capacity, and
- b. To any obligation to share damages with or repay someone else who must pay damages of the injury.

5) Fellow Employee

"Bodily injury" to any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business.

6) Care, Custody or Control

"Property damage" to or "covered pollution cost or " involving property owned or transported by the "insured" or in the "insured's" care, custody or control.

7) Handling of Property

"Bodily injury" or "property damage" resulting from the handling of property:

- i. Before it is moved from the place where it is accepted by the "insured" for movement into or onto the "covered auto"; or
- ii. After it is move from the "covered auto: to the place where it is finally delivered by the "insured".

- 8) **Movement of Property by Mechanical Device**
 "Bodily injury" or "property damage" resulting from the movement of property by a mechanical device.
- 9) **Operations**
 "Bodily injury" or "property damage" arising out of the operations of:
 i. Any equipment listed in Paragraphs 7.a and 7.b
 ii. Machinery or equipment that is on or attached to or part of the "covered auto".
- 10) **Completed Operations**
 "Bodily injury" or "property damage" arising out of your work after that work has been completed or abandoned.
 In this exclusion your work means:
 i. Work or operations performed by you or your behalf, and
 ii. Materials, parts or equipment furnished in connection with such work or operations.
 Your work includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in Paragraph a. or b. above.
 Your work will be deemed completed when all of the work called for in your contract has been completed.
 Work may need service, maintenance or correction, repair or replacement but which is otherwise complete, will be treated as completed.
- 11) **Pollution**
 "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.
- 12) **War**
 "Bodily injury" or "property damage" arising directly or indirectly out of
 i. War, including undeclared or civil war
 ii. Warlike action by a military force
 iii. Insurrection, rebellion, revolution, usurped power or action taken by governmental authorities in hindering or defending against any of these.
- 13) **Unknown Motor Vehicle**
 To the extent that this policy includes uninsured and/or underinsured motorists coverage as elected by the insured or required by law, if the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by the unknown person and the person or property of the insured.

C. Limit of Insurance

Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for the total of all damages and "covered pollution cost or expense" combined, resulting from any one "accident" is the Limit of Insurance for Liability Coverage shown in the Declarations

All "bodily injury" and "property damage" and "covered pollution cost or expense" resulting from continuous or repeated exposure to substantially the same condition will be considered as resulting from one "accident".

No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Medical Payments Coverage, Uninsured Motorists Coverage Endorsement attached to this Coverage Part.

NOTICE OF REDUCTION IN COVERAGE

To the extent permitted under applicable state law, the limits shown on the Declarations page are subject to reduction to the state mandatory minimums for bodily injury or death and property damage, when there is a permissive user of the covered auto.

SECTION III - PHYSICAL DAMAGE COVERAGE

This Policy does not provide coverage for Physical Damage Coverage for Comprehensive and/or Collision including any extensions of coverage thereof.

SECTION IV – BUSINESS AUTO CONDITIONS

The following conditions apply in addition to the Common Policy Conditions:

A. Loss Conditions

1) Duties In The Event Of Accident, Claim, Suit Or Loss

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- i. In the event of "accident", "claim", "suit" or "loss" you must give us or our authorized representative prompt **written** notice of the accident or loss to include:
 - a. How, when to include time and where the "accident" or "loss" occurred;
 - b. The "insured's" name and address; and
 - c. To the extent possible the names and addresses of any injured persons and witnesses.
- ii. Additionally you and other involved "insured" must:
 - a. Assume no obligation, make no payment or incur no expense without our consent, except at the "insured's" own cost.
 - b. Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit".
 - c. Cooperate with us in the investigation or settlement of the claim or defense against the "suit".
 - d. Authorize us to obtain medical records or other pertinent information.
 - e. Submit to examination at our expense, by physicians of our choice, as often as we reasonably require.
- iii. If there is "loss" to a covered "auto" or its equipment you must also do the following:
 - a. Promptly notify the police if the covered "auto" or any of its equipment is stolen.
 - b. Take all reasonable steps to protect the covered "auto" from further damage. Also keep a record of your expenses for consideration in the settlement of the claim.
 - c. Permit us to inspect the covered "auto" and records proving the "loss" before its repair or disposition.
 - d. Agree to examinations under oath at our request and give us a signed statement of your answers.

It is further agreed that upon an accident or loss, that if possible you will provide telephonic notice and such contact information has been provided to you. Promptly following this you will advise us in writing and request formal acknowledgement of receipt of such notice

SECTION V - COMMON POLICY CONDITIONS

A. Cancellation

The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.

We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:

- 1) 10 days before the effective date of cancellation if we cancel for nonpayment of any premium due; or
- 2) 30 days before the effective date of cancellation if we cancel for any other reason including but not limited to failure to meet any requirements arising out of an inspection, audit or a material change in exposure.

We will mail or deliver our notice to the first Named Insured's last mailing address known to us.

Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.

If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.

If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. Examination of Your Books And Records

We may examine and audit your books and records as they related to this policy at any time during the policy period and up to three years thereafter.

D. Inspections and Surveys

We have the right to:

- 1) Make inspections and surveys at any time;
- 2) Give you reports on the conditions we find; and
- 3) Recommend and require changes, and failure to make those changes gives us the right to cancel such insurance

We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

- 1) Are safe or healthful; or
- 2) Comply with laws, regulations, codes or standards.

Paragraph 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

E. Premiums

The first Named Insured shown in the Declarations:

- 1) Is responsible for the payment of all premiums; and
- 2) Will be the payee for any return premiums we pay.

F. Transfer of Your Rights and Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

G. Legal Action Against Us

No one may bring a legal action against us under this Coverage Form until:

- 1) There has been full compliance with all of the terms of this Coverage Form; and
- 2) Under Liability Coverage we agree in writing that the "insured" has an obligation to pay or until the amount of that obligation has finally been determined by judgment after trial. No one has the right under this policy to bring us into an action to determine the "insured's" liability.

H. Transfer of Rights of Recovery Against Others to Us

If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after the "accident" or "loss" to impair them.

I. Bankruptcy

Bankruptcy or insolvency of the "insured" or the "insured's" estate will not relieve us of any obligations under this Coverage Form.

J. Concealment, Misrepresentation Or Fraud

This Coverage Form is void in any case of fraud by you at any time as it relates to this Coverage Form. It is also void if you or any other "insured", at any time intentionally conceal or misrepresent a material fact concerning:

- 1) This Coverage Form
- 2) The covered "auto"
- 3) The drivers using any covered "auto"
- 4) Your interest in the covered "auto" or
- 5) A claim under this Coverage Form.

K. Liberalization

If we revise this Coverage Form to provide more coverage without additional premium charge, your policy will automatically provide the additional coverage as of the day the revision is effective in your state.

L. Other Insurance

- 1) For any covered "auto" you own and have advised the Company and received written confirmation of coverage in effect, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance is excess over any other collectible insurance.

- 2) Regardless of the provisions of Paragraph 1) above, this Coverage Form's Liability Coverage is primary for any liability assumed under an "insured contract" as defined in this policy.
- 3) When this Coverage Form and any other Coverage Form or policy covers on the same basis either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

M. Premium Audit

The estimated premium for this Coverage Form is based upon the exposures you advised us in writing you have when the policy began. We will compute the final premium due when we determine your actual exposures. The estimated total premium will be credited against the final premium due and the first Named Insured will be billed for the balance, if any. The due date for the final premium or retrospectively premium is the date shown as the due date on the bill. If the estimated total premium exceeds the final premium due, the first Named Insured will get a refund. If this policy is issued for more than one year, the premium for this Coverage Form will be computed annually based on our rates or premiums in effect at the beginning of each year of the policy.

N. Policy Period, Coverage Territory

Under this Coverage Form, we cover "accidents" and "losses" occurring:

- 1) During the policy period shown in the Declarations, and
- 2) Within the coverage territory.

The coverage territory is the United States of America

O. Two or More Coverage Forms or Policies Issued by Us

If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same "accident" the aggregate maximum Limit of Insurance under all Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy. This condition does not apply to any Coverage Form or policy issued by us or an affiliated company specifically to apply as excess insurance over this Coverage Form.

SECTION VI - DEFINITIONS

- A. "Accident" includes continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage".
- B. "Auto" means:
 - 1) A land motor vehicle, designed for travel on public roads; or
 - 2) Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".
- C. "Bodily injury" means bodily injury, sickness or disease sustained by a person including death resulting from any of these
- D. "Covered pollution cost or expense" means any cost or expense arising out of:
 - 1) Any request, demand, order or statutory or regulatory requirement that any "insured" or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; and such "Covered pollution cost or expense" arising out of an "accident" or "loss" causing "bodily injury" and/or "property damage".
 - 2) Covered pollution cost or expense" does not include any cost or expense arising out of the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants".
 - 3) That are, or that are contained in any property that is:
 - i. Being transported or towed by, handled, or handled for movement into, onto or from the covered "auto";
 - ii. Otherwise in the course of transit by or on behalf of the "insured";
 - iii. Being stored, disposed of, treated or processed in or upon the covered "auto".
- E. "Diminution in value" means the actual or perceived loss in market value or resale value which results from a direct and accidental "loss".
- F. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

- G. "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.
- H. "Insured contract" means:
- 1) A lease of vehicles which has been advised to the Company; and
 - 2) The Company has confirmed in writing that such contract is covered by the insurance afforded by this policy.
- I. Unless otherwise defined in a state-specific supplement and/or selection and /or rejection form accompanying this policy, "Uninsured Motorist(s)" coverage means insurance protection to an insured for compensatory damages which the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury or property damage caused by an automobile accident. Also included are damages due to bodily injury that result from an automobile accident with a hit-and-run vehicle whose owner or operator cannot be identified.
- J. Unless otherwise defined in a state-specific supplement and/or selection and/or rejection form accompanying this policy, "Underinsured Motorists(s)" coverage means insurance protection to an insured for compensatory damages which the insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury caused by an automobile accident.



Jason Sears - Secretary
(Authorized Representative)

POLICY NUMBER: OIC-SC-0001119-02
POLICY PERIOD: 03/29/2018 - 03/29/2019
NAME INSURED: Viktar Kleuchenia (Imperial Cab)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

CAMERA REQUIREMENT

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM

With respect to coverage provided by this endorsement the provisions of the Coverage Form apply unless modified by the endorsement.

As a requirement of coverage under this policy, all covered autos must have a properly installed video camera approved by us and which is turned on and properly functioning, within the time period indicated on the **Commercial Automobile Liability Insurance Binder** issued to the insured.

In the event an accident occurs after this period, involving an insured vehicle, and the camera is not properly installed with functioning video, then a \$2,500 penalty will be assessed.



Jason Sears - Secretary
(Authorized Representative)

Date: 03/29/2018

POLICY NUMBER: OIC-SC-0001119-02
POLICY PERIOD: 03/29/2018 - 03/29/2019
NAME INSURED: Viktor Kleuchenia (Imperial Cab)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

**OPERATING UNDER THE INFLUENCE OF DRUGS OR ALCOHOL OR
OTHER INTOXICANTS/MIND-ALTERING SUBSTANCES**

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM

With respect to coverage provided by this endorsement the provisions of the Coverage Form apply unless modified by this endorsement.

In the event an accident or incident occurs, for which this policy provides coverage, with the driver of the vehicle insured under this policy is found to be operating the vehicle while under the influence of drugs or alcohol or any other intoxicants or mind-altering substances, then Onyx Insurance Company has the sole option to cancel this policy with 20 days' notice OR may elect to impose a minimum deductible of \$3,000 or three times the deductible shown on the **Business Auto Policy Declarations page**, whichever the greater.

It is further agreed, effective immediately at the date of accident or incident, no further coverage under this policy will be provided for the subject accident/incident driver.



Jason Sears - Secretary
(Authorized Representative)
Date: 03/29/2018

ONYX INSURANCE COMPANY, INC., A RISK RETENTION GROUP

SUBSCRIPTION AND SHAREHOLDERS AGREEMENT

INSURED: Viktor Kleuchenia (Imperial Cab)

POLICY #: OIC-SC-0001119-02

THIS SUBSCRIPTION AND SHAREHOLDERS AGREEMENT ("Agreement") is made and entered into the effective date of the Policy identified above by and between ONYX INSURANCE COMPANY, INC., A RISK RETENTION GROUP, a Tennessee corporation (the "Company"), and the Shareholder shown on the signature page of this Agreement (the "Shareholder").

BACKGROUND

A. The Company is a stock corporation and was formed in 2013 as a risk retention group under the federal Liability Risk Retention Act of 1986, as amended, and the laws of the State of Tennessee pertaining to captive insurance companies for the purpose of providing liability insurance to the shareholders and affiliated public livery businesses thereof. The Company is regulated by the Tennessee Department of Commerce and Insurance (the "Department").

B. The Shareholder is a public livery provider or related entity that, as of the effective date of this Agreement, meets the eligibility requirements to be a shareholder of the Company.

C. In order to be an insured of the Company, the Shareholder is required to purchase common stock of the Company, par value Two Dollars (\$2.00), in such quantity and for such price as are set forth below. The total price being paid by the Shareholder to purchase common stock in the Company shall be called the "Capital Contribution."

D. This Agreement is required to be signed by each of the shareholders of the Company.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the sufficiency of which are hereby acknowledged, the Company and the Shareholder hereby agree as follows:

1. Eligibility. The Company has established eligibility requirements that each person or entity insured by the Company is required to meet in order to become a shareholder, which shall include without limitation that each shareholder shall at all times be an insured of the Company, and the Company retains the exclusive right to modify such requirements as it deems appropriate. The Shareholder and the Company agree and acknowledge that they have reviewed the eligibility requirements applicable on the effective date of this Agreement, and that the Shareholder meets such requirements.

2. Shares and Capital Contribution. The Capital Contribution and amount of shares are taken from and calculated on the initial insurance premium. The formula used by the Company to determine the total amount of shares issued is as follows: initial premium amount x .06 ÷ 2. The Capital Contribution is taken from the initial premium.

3. Transfers and Holding of Shares.

(a) This Agreement at all times shall apply to any and all shares of stock in the Company, whether now held, purchased hereunder, or acquired hereafter by the Shareholder (collectively, the "Shares");

(b) The Shareholder shall not assign, sell, exchange, give, bequeath, encumber, pledge, alienate, hypothecate, or otherwise in any manner whatsoever, either voluntarily or involuntarily, transfer any of the Shareholder's Shares (any such disposition being hereinafter referred to as a "Transfer"), except (i) in accordance with this Agreement, or (ii) by operation of law in the event of a merger or business combination in which the Shareholder is a party, *provided, however*, that following the merger or business combination, the Shares are held by an individual or entity whose ownership of the Shares satisfies the requirements of the Liability Risk Retention Act of 1986, as amended, as well as the eligibility requirements of the Company. The Company shall not honor or give effect on the books of the Company to any Transfer of, or any attempt to Transfer any Shares until it is satisfied that the requirements of this Agreement have been met;

(c) If the Company so determines, it may cause to be placed on the certificates for Shares the following notation, and the Shareholder shall cooperate with the Company in the placement of such notation on his certificate(s):

The holder's power to transfer this stock is limited by an Agreement between the Company and the Shareholder, a copy of which (together with any amendments to the Agreement) is on file at the principal office of the Company.

4. Certain Obligations of the Shareholder. In addition to the other obligations set forth in this Agreement, the Shareholder agrees to perform and comply with all of the following:

(a) Pay promptly when due the amounts agreed to be paid for the purchase of the Shares;

(b) Maintain insurance coverage with the Company and pay all premiums in respect of such insurance coverage in full and when due, in accordance with the terms and conditions quoted to the Shareholder for such insurance coverage;

(c) Comply with the terms of this Agreement and the Company's Charter and Bylaws, copies of which have been made available to the Shareholder, provisions of any contract of insurance between the Shareholder and the Company, applicable underwriting standards, and any applicable risk management/loss prevention program developed by the Company.

5. Dividends. The Shareholder acknowledges that the Company may from time to time declare and pay shareholder dividends to the shareholders. The Shareholder further acknowledges and agrees to the following:

(a) The amount, timing and payment of dividends are within the sole discretion of the Company. No dividends will be paid by the Company unless the Board of Directors determines that such payment is prudent and in the best interests of the Company and unless the Company shall be permitted to make such payment pursuant to Tennessee law;

(b) The Company may elect in its sole discretion to retain its profits rather than distribute them as dividends;

(c) Any payment of dividends is not assured;

(d) Shareholder dividends shall be declared and payable only from the profits of the Company as a whole, and shareholder dividends may not be paid to the Shareholder even if the Shareholder's individual results are profitable.

6. Termination of Shareholder Status. Each of the following events (hereinafter, a "Termination Event") shall require the Shareholder (or his estate or legal or personal representative, as the case may be) to sell all of the Shares back to the Company, shall cause the Shareholder's rights as a shareholder in the Company to immediately and automatically terminate, and shall likewise require the Company to redeem and repurchase all of the Shares owned by the Shareholder, all in accordance with Section 7 below:

(a) The Shareholder no longer satisfies the eligibility requirements applicable to the Shareholder on the effective date of this Agreement;

(b) The Shareholder's insurance policy from the Company is cancelled or non-renewed for any reason whatsoever, or the Shareholder otherwise ceases to have a current policy of insurance in force from the Company for any reason whatsoever;

(c) The death or dissolution of the Shareholder;

(d) All or any part of the Shares are attached or seized in an execution proceeding and such attachment or execution is not discharged or otherwise dissolved within thirty (30) days;

(e) All or any part of the Shares are attached, seized or subject to any order or decree of any court authorizing or directing any Transfer of all or any part of the Shares in any proceeding for divorce, alimony, separate maintenance or distribution of marital property; or

(f) Any attempt by the Shareholder to Transfer his Shares other than to the Company;

(g) Bankruptcy or other insolvency of the Shareholder; or

(h) Failure of the Shareholder to satisfy any deductible within thirty (30) days of demand.

7. Terms of Redemption.

(a) Upon the occurrence of a Termination Event, the Shareholder or his estate or legal or personal representative, and any other holder of all or any part of the Shares, as the case may be (hereinafter, individually and collectively, the "Transferor") shall immediately tender all Shares to the Company for redemption at the price specified in Section 7(b) below;

(b) The price to be paid to a Transferor for the redemption of Shares upon a Termination Event shall be determined under the applicable Subsection (i) through (iii) below (as applicable, the "Price"):

(i) If the Termination Event occurs four (4) years or more from the initial inception date of the insurance coverage and such policy has been maintained continuously with no interruption of coverage with respect to the Shareholder (the "Inception Date"), the Price shall be determined by the Board of Directors with a total price not to exceed \$100.00;

(ii) In the event that coverage has not been continuously maintained for at least four (4) years, the Shareholder will not be entitled to any payment;

(iii) All such payments must meet all applicable regulations as set forth by Department;

(c) All amounts due the Company for any reason from the Shareholder may be offset against any distribution to the Shareholder;

(d) Determination of the amount of the redemption, if any, for the Shares shall be held within sixty (60) business days of the latest of (i) the occurrence of the Termination Event, (ii) the date on which the President of the Company actually learns of the Termination Event, or (iii) the preparation of the Company's regularly-prepared fiscal year-end financial statements;

(e) The payments shall be made annually in equal amounts over five (5) years on each of the five anniversary dates of the Termination Event. Such payments shall be made only in the event that the Shareholder has met all of the obligations of the redemption;

(f) Notwithstanding anything herein to the contrary, the Company shall not be obligated to pay any such amounts in the event that the Company's Board of Directors, in its sole discretion, determines that any such payment would adversely affect the Company's operations and/or financial condition. The Company shall have the sole right to eliminate, suspend and/or defer any such payment based upon such determination. Furthermore, any such payment shall be subject to the Company having met any requirements and having obtained any such required approval by the Department.

8. Waiver of Claims Against Shareholders; Rights of Third Parties.

(a) The Shareholder hereby agrees to waive any claim it may have against any other shareholder, the administrator, or the manager based on the insolvency of the Company or any related entity thereof;

(b) No person, except the Company or any shareholder, shall be deemed to have any right conferred upon it by any provision of this Agreement. No term of this Agreement shall be enforceable against the Company or any shareholder except by the Company, its assignee, or one or more shareholders.

9. Shareholder's Representations and Warranties. The Shareholder hereby represents and warrants to the Company that:

(a) The Company has made available to the Shareholder and its advisors the opportunity to evaluate an investment in the Company, and to obtain additional information and to evaluate the merits and risks of this investment and to ask questions of, and receive satisfactory answers from, representatives of the Company concerning the terms and conditions of this investment;

(b) The Shareholder understands the risks involved in an investment in the Company. The Shareholder recognizes that an investment in the Company is speculative and involves substantial risk of loss;

(c) The Shareholder is an "accredited investor" as such term is defined in applicable federal and State securities laws, and the Shareholder can afford a loss of the entire investment in the Company;

(d) The Shareholder represents that its knowledge and experience in financial and business matters in general are such that it is capable of evaluating the merits and risks of an investment in the Company;

(e) The Shareholder is purchasing the Shares solely for its own account and not with a view to distribution, sale or subdivision, or for the account of any other individual, corporation, firm or person;

(f) The Shareholder is purchasing the Shares as part of an insurance program, and for the sole purpose of obtaining insurance coverage which may be otherwise unavailable to Shareholder, and the Shareholder is not making this investment with the expectation of profiting from the operations of the Company or from any sale, redemption or repurchase of stock;

(g) The Shareholder recognizes that there will be no public market for the Shares and that the transferability of the Shares is restricted;

(h) No person or firm is promising or guaranteeing that the Shareholder will receive a return or profit from its investment in the Company, nor is any such return or profit expected or contemplated; and

(i) The person(s) executing this Agreement on behalf of the Shareholder has/have the authority to execute this Agreement, without the necessity of additional signatories.

10. Proxy. The undersigned shareholder of Onyx Insurance Company, Inc., a Risk Retention Group, hereby appoints the Manager of Onyx Transportation Services LLC as the proxy of the undersigned, to attend all shareholders' meetings, and to exercise all shareholder rights of the undersigned, including without limitation the right to vote, for eleven (11) months from the date of the filing of this proxy to the extent permitted under applicable law; provided, however, that the undersigned may revoke this proxy at any time either by (i) attending any such shareholders meeting and declaring this proxy to be revoked, or (ii) submitting a written revocation to the Secretary of the Company at any time prior to any such meeting.

11. Assignment.

(a) By Shareholder. The Shareholder may not assign any right, claim, or interest it may have under this Agreement or under any policy issued by the Company or a subsidiary thereof, except (i) as specifically may be agreed to in writing by the Company, or (ii) subject to the limitations set forth in Section 3.b. above, by operation of law in the event of a merger or business combination to which the Shareholder is a party. No creditor, assignee or third-party beneficiary of the Shareholder shall have any right, claim, or title to any part, share, interest, funds, or assets of the Company except as specifically may be agreed to in writing by the Board of Directors of the Company. Any successor to the assets, liabilities or operations of the Shareholder shall be liable to the Company or its assignee for any amounts due the Company or the Company from such Shareholder;

(b) By Company. This Agreement may be transferred and assigned by operation of law to any successor entity to the Company in connection with any merger or other business combination to which the Company is a party.

12. Severability. Should any portion, term, condition, or provision of this Agreement be determined by a court of competent jurisdiction to be invalid under any applicable law or otherwise rendered unenforceable, the validity of the remaining conditions and provisions shall not be affected thereby.

13. Governing Law. This Agreement shall be construed in accordance with the substantive law of the State of California, without regard to principles of conflicts of laws. The term "person" shall mean any individual, entity, unincorporated association, or other juridical person. Any reference to a gender, masculine, feminine, or neuter, shall refer to all genders.

14. ARBITRATION AND CLASS ACTION WAIVER.

(a) Any controversy or claim arising from or relating to this Agreement or the breach thereof, shall be settled by arbitration in accordance with the Federal Arbitration Act. Arbitration will be venued in San Francisco, California, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Claims within the monetary limit of the small claims court shall be litigated in such court at the request of any party, so long as all parties limit their right to recovery to the jurisdiction of the small claims court;

(b) Any claim filed in small claims court shall not be deemed to be a waiver of the right to arbitrate, and, if a counter claim in excess of the jurisdiction of the small claims court is filed in the municipal or superior court, then the party filing in small claims court may demand arbitration pursuant to this paragraph;

(c) The arbitrators will have authority to award actual monetary damages only. No punitive or equitable relief is authorized. The arbitrators' decision shall be final and legally binding. All parties shall bear their own costs for arbitration and no attorneys' fees or other costs shall be granted to either party; and

(d) Class Action Waiver. No party shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities or arbitrate any claim as a representative member of a class.

15. Term. This Agreement shall continue in effect until it is rescinded by the mutual written consent of the parties hereto or otherwise terminated as provided by this Agreement or applicable law.

16. Amendment. This Agreement may be amended upon the mutual written consent of the parties.

17. Complete Agreement. This Agreement, including all counterparts hereof, the Charter, Bylaws, policy terms, and any applicable rules and regulations that may be adopted from time to time by the Board of Directors, constitutes the full and complete terms of this Shareholders Agreement. There are no oral understandings or agreements not set forth in writing herein or in the aforementioned other writings. Shareholder acknowledges the receipt of a copy of the Charter and Bylaws of the Company. This Agreement may be executed in any number of counterparts, all of which taken together shall be deemed one original.

18. Notice. All offers, acceptances and notices shall be in writing and sent certified mail, return receipt requested, to the principal office of the Company, when addressed to the Company, or to the address of the Shareholder appearing on the Company's books, when addressed to the Shareholder.

IN WITNESS WHEREOF, the parties hereto have caused this Subscription and Shareholders Agreement to be executed and effective as of the date first above written.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION AND CLASS-ACTION WAIVER WHICH AFFECTS YOUR LEGAL RIGHTS AND MAY BE ENFORCED BY THE PARTIES.

ONYX INSURANCE COMPANY, INC.,
A RISK RETENTION GROUP

Date: 03/29/2018

By: 
Jason Sears, Secretary

SHAREHOLDER

Date: _____

By: _____

Name: _____

Title: _____

Number of Shares Acquired Based Upon Formula: 74

ONYX BUSINESS AUTO POLICY
FORM UM 1101

POLICY NUMBER: OIC-SC-0001119-02
POLICY PERIOD: 3/29/2018 - 3/29/2019
NAME INSURED: Viktor Kleuchenia (Imperial Cab)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

UNINSURED/UNDERINSURED DEDUCTIBLE ENDORSEMENT

It is hereby agreed and understood that the greater of the state mandated deductible or the policy deductible will be applied to Uninsured/Underinsured claim settlement payments. Such condition to apply to those policies that provide Uninsured/Underinsured coverage.

By: 
Jason Sears - secretary
(Authorized Representative)
Date: 3/29/2018

Installment Schedule

Insured: Viktor Kleuchenia (Imperial Cab)

Policy #: OIC-SC-0001119-02

Policy Period: 03/29/2018 - 03/29/2019

Due Date	Premium Due	Tax Due	Installment Fee	Total Due
03/29/2018	\$1,046.00	\$7.20	\$0.00	\$1,053.20
04/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
05/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
06/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
07/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
08/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
09/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
10/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
11/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
12/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
01/29/2019	\$198.40	\$2.88	\$5.00	\$206.28

Notes:

- 1) Payments must be received by Onyx on or before the due date otherwise a Notice of Cancellation will be generated.
- 2) Changes to the policy (adding or removing vehicles, etc.) may change future installment amount dues.

VEHICLE LISTING

Before submitting, make sure to complete the DRIVER list (click I
If binding an Auto Physical Damage policy, the Vehicle Value

VIN	Year	Make	Model	Vehicle Value
1GNDM19W8YB104777	2000	CHEVROLET	ASTRO VAN	
2D8HN54X88R698644	2008	DODGE	GRAND CARAVAN	



Driver tab below)
is required.

License Plate #	License State
	SC
	SC

EXHIBIT B
(Assumption Certificate)

ASSUMPTION CERTIFICATE

Insured: Viktor Kleuchenia (Imperial Cab)

Policy Number: OIC-SC-0001119-02

Assumption Date: June 30, 2021

THIS IS TO CERTIFY that pursuant to the terms of an Assumption and Indemnity Agreement effective June 30, 2021 by and between **ONYX INSURANCE COMPANY, INC., A RISK RETENTION GROUP** ("Onyx") and **TEXAS INSURANCE COMPANY**, a Texas fire and casualty insurance company (the "Company"), the Company has assumed all of the obligations and liabilities of Onyx under the above Policy and all endorsements and riders thereto. All terms and conditions of the Policy remain unchanged except that from and after the Assumption Date, the Company shall be the insurer under the Policy. All notices, claims, and correspondence shall be made directly to the Company's administrator at the address specified below.

IN WITNESS WHEREOF, TEXAS INSURANCE COMPANY has caused this Assumption Certificate to be executed by its duly authorized officer.



Jeffrey A. Silver, Texas Insurance Company

Administrator
10805 Old Mill Road
Omaha, NE 68154

**THIS CERTIFICATE BECOMES A PART OF YOUR POLICY
AND SHOULD BE ATTACHED TO THE POLICY**

EXHIBIT C
(Proof of Service on Brian McLeod)

EXHIBIT D
**(Proof of Service on Onyx Insurance
Company, Inc. via South Carolina
Department of Insurance)**



South Carolina Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

HENRY McMASTER
Governor

RAYMOND G. FARMER
Director

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105

August 17, 2021

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
ONYX INSURANCE COMPANY, INC., A RISK RETENTION GROUP
575 S. Saliman Road
Carson City, NV 89701-0000

Dear Sir:

On August 17, 2021, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-87-80(C). By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 38-77-160. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to sdubois@doi.sc.gov. When replying, please refer to File Number 185194, Viktar Kleuchenia v. Brian McCleod, 2021-CP-26-04596.

By:

Gwendolyn L. Fuller
General Counsel
(803)737-6732

Sincerely Yours,

Raymond G. Farmer
Director
State of South Carolina
Department of Insurance

Attachment

CC: Jared C. Williams
Post Office Box 403
Mount Pleasant, SC 29465

ELIECTRONICALLY FILED -- 2021 Sep 30 10:40 AM -- HONORARY -- COMMON PLEAS -- CASE#2021CP2604596

EXHIBIT E

**(Proof of Service on Texas Insurance
Company via South Carolina Department of
Insurance and Certified Mail)**



South Carolina Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

HENRY McMASTER
Governor

MICHAEL WISE
Acting Director

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105

September 27, 2022

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Texas Insurance Company
700 North Pearl, 25th Floor
25th Floor
Dallas, TX 75201

Dear Sir:

On September 27, 2022, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-45-170. By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 38-77-160. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. The claimant, within this service letter, provided the following additional information regarding this first party claim: POLICY/CLAIM NUMBER OIC-SC-0001119-02. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to spurvis@doi.sc.gov. When replying, please refer to File Number 190666, Viktar Kleuchenia v. Brian Mcleod, 2021-CP-26-04596.

By:

Gwendolyn McGriff
General Counsel
(803)737-6732

Sincerely Yours,

Michael Wise
Acting Director
State of South Carolina
Department of Insurance

Attachment

CC: Jared C. Williams
Post Office Box 403
Mount Pleasant, SC 29465

FILED FOR RECORDING - 2022 SEP 28 10:35 AM - HONORARY - COMMONS COMPLAINTS - CASE# 2022-CP-2604596

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
■ Complete items 1, 2, and 3. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature ☒ <i>Chris Sheets</i> ☐ Agent ☐ Addressee	
1. Article Addressed to: Texas Insurance Company 10805 Old Mill Road Omaha, NE 68154		B. Received by (Printed Name) <i>Chris Sheets</i>	C. Date of Delivery 9-27
2. Article Number (Transfer from service label) 7022 2410 0001 4795 0310		D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No	
3. Service Type ☐ Adult Signature ☐ Adult Signature Restricted Delivery ☒ Certified Mail® ☐ Certified Mail Restricted Delivery ☐ Collect on Delivery ☐ Collect on Delivery Restricted Delivery ☐ Insured Mail ☐ Insured Mail Restricted Delivery (over \$500)		☐ Priority Mail Express® ☐ Registered Mail™ ☐ Registered Mail Restricted Delivery ☐ Signature Confirmation™ ☐ Signature Confirmation Restricted Delivery	
PS Form 3811, July 2020 PSN 7530-02-000-9053		Domestic Return Receipt	

USPS TRACKING#

9590 9402 7796 2152 3342 83

United States
Postal Service

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4® in this box•

Jared Williams
P.O. Box 403
Mt. Pleasant, SC 29465

EXHIBIT F
(Order of Judgment for Damages)

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

VIKTAR KLEUCHENIA,

Plaintiff,

v.

BRIAN MCLEOD,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2022-CP- 26-04596

**ORDER OF JUDGMENT
FOR DAMAGES**

Plaintiff Viktor Kleuchenia ("Mr. Kleuchenia") brought this negligence action against Brian McLeod ("Mr. McLeod") for personal injuries and other damages sustained as a result of a motor vehicle collision occurring on July 17, 2018. For the reasons set forth below, the Court finds in favor of Mr. Kleuchenia in the amount of Three Million Two Hundred Fifty Thousand and 00/100 Dollars (\$3,250,000.00).

I. PROCEDURAL HISTORY

Mr. Kleuchenia filed suit against Mr. McLeod on July 12, 2021. Mr. Kleuchenia settled with Mr. McLeod's liability carrier on a covenant not to execute and proceeds to pursue UIM benefits. Mr. Kleuchenia served his UIM carrier through the South Carolina Department of Insurance, with proof of service filed with the Court. The UIM carrier has not appeared in the case.

The Court granted summary judgment on the issue of liability by order dated August 15, 2023, and referred the case to a special referee to assess Mr. Kleuchenia's damages. A bench trial was held on April 9, 2024.¹ Notice of the trial was provided to all parties, including the UIM carrier, who made no appearance.²

¹ The case file, including the transcript and copies of all exhibits, is held by counsel for Plaintiff.

² The Court notes that neither Mr. McLeod nor the UIM carrier has been held in default by order of the Court. The record shows Mr. McLeod appeared and plead through his liability carrier. The record further shows the issue of liability was heard on the merits by motion and order of the Court. The UIM carrier has been served with the pleadings and notice of the trial was provided.

Having considered the testimony and exhibits admitted at trial, as well as Plaintiff's Pre-trial Brief, the Court now makes the following findings of fact and conclusions of law in accordance with South Carolina Rule of Civil Procedure 52(a).

II. EVIDENCE AT TRIAL³

1. Mr. Kleuchenia was born on February 27, 1981. He is currently forty-three (43) years old and was thirty-seven (37) years old at the time of the wreck. (Tr. 18:9-22; Tr. 24:11-13).

2. Mr. Kleuchenia is originally from Belarus and resides at 617 36th Ave. N., Apt. G, Myrtle Beach, South Carolina since 2003. (Tr. 18:23-24).

3. Mr. Kleuchenia came to the United States by himself in 2003, when he was twenty-two (22) years old. (Tr. 20:3-7).

4. Mr. Kleuchenia attended four years of education in Belarus but was one year short of graduating. He did not receive a diploma and has no professional certifications. (Tr. 20:14-25; Tr. 21:1-2).

5. Mr. Kleuchenia spoke some English when he first came to the United States but primarily learned once he arrived. He speaks English as a second language. (Tr. 21:3-11).

6. Mr. Kleuchenia is divorced and has no children. He has no family in the United States. Both of his parents are alive and still reside in Belarus. (Tr. 21:21-24; Tr. 22:1-14).

A. The Motor Vehicle Collision

7. The motor vehicle collision between Mr. Kleuchenia and Mr. McLeod occurred in Horry County on July 17, 2018 (hereinafter "Collision"). (Tr. 24:6-10).

8. Mr. Kleuchenia was traveling north on Highway 17 when Mr. McLeod attempted to exit Avenue 52 to go south on Highway 17, pulling out in front of Mr. McLeod. (Tr. 32:5-19).

³ These findings are based on the preponderance of the evidence presented to the Court.

9. Mr. Kleuchenia testified the front of his vehicle impacted the driver side of Mr. McLeod's vehicle going approximately 40-45 miles per hour. (Tr. 33:20-22; 34:1-4).

10. Mr. Kleuchenia submitted two photographs of his vehicle following the Collision which showed significant property damage. (See Exhibits 1 and 2). The vehicle was deemed a total loss. (Tr. 25:22-24; Tr. 102:1-4).

B. Evidence Regarding Mr. Kleuchenia's Medical Treatment and Expenses

11. Mr. Kleuchenia testified he had no significant medical history prior to the Collision and had never had any prior injuries or medical treatment to his left foot, right knee, lower back, or abdomen. (Tr. 22:15-25; Tr. 23:1-3).

12. Mr. Kleuchenia reported to Grand Strand Regional on the day of the accident with complaints of chest pain, headache, back pain, and right knee pain. (See Ex. 4 at PLF029-PLF037).

13. He received CT imaging to his cervical, head, chest, and an x-ray to his right knee. (See Ex. 4 at PLF045-PLF049).

14. Mr. Kleuchenia followed up at Access Medical within days of the Collision with continued pain in his bilateral knees, bilateral back, bilateral wrists, bilateral arms, left foot, abdominal pain, and continued pain in his chest with deep breaths. (See Ex. 4 at PLF068-PLF069).

15. Mr. Kleuchenia received an additional CT scan of his abdomen, along with x-rays of his right knee, chest, left foot, and left knee. He was prescribed pain medications and referred for physical therapy. He is noted to have ongoing difficulty with breathing and his pain is rated for various body parts as a 5-10/10 during these initial visits. (See Ex. 4 at PLF 068-PLF087).

16. Mr. Kleuchenia was eventually referred to OrthoSC for orthopedic treatment to his left foot, right knee, and lower back. He was also recommended for a referral to a urologist for his abdominal pain. (Ex. 4. at PLF111).

17. On October 11, 2018, Mr. Kleuchenia was first seen at OrthoSC with pain at a 10/10 at worst. (Ex. 4 at PLF234). Mr. Kleuchenia has treated primarily with Dr. Christopher Crosby, DPM, for his left foot injury; Dr. Nathaniel R. Evans, M.D., for his right knee injury; and Dr. Stephen Parker, M.D. (pain management) and Dr. Todd Cook, M.D. (orthopedic surgeon) for his lower back injury. (See generally, Ex. 4).

Left Foot Injuries and Treatment

18. On September 26, 2018, Mr. Kleuchenia received an x-ray of the left foot noting degenerative changes and possible fracture of the first metatarsal phalanx joint. (Ex. 4 at PLF209).

19. On October 23, 2018, he was seen noting constant pain in his left foot described as aching, gnawing, and dull. He was provided an initial cortisone injection into the first MTP joint. (Ex. 4 at PLF242-244).

20. Mr. Kleuchenia followed up with Dr. Crosby for his left foot on several occasions noting continued pain, erythema, swelling, and decreased range of motion in the first MTP. (Ex. 4 at PLF249-PLF251; PLF255-PLF257; PLF274-PLF276; PLF298-PLF300).

21. On July 16, 2020, Dr. Crosby prescribed Indomethacin and recommended an MRI to further evaluate for tendonitis or stress fracture. (Ex. 4 at PLF334-PLF337).

22. Mr. Kleuchenia received an MRI of the left foot noting great toe metatarsophalangeal joint disease with degenerative joint effusion and medial bursitis, along with edema of the anterior ankle, distal fibula, and os trigonum. (Ex. 4 at PLF338-PLF343).

23. On August 6, 2020, upon review of the MRI, Dr. Crosby recommended surgical intervention for a total joint replacement of the first MTP. (Ex. 4 at PLF338-340).

24. Mr. Kleuchenia did not receive surgery at that time but continued to follow up with Dr. Crosby on several occasions recommending supporting shoes, rest, ice, medications, and physical therapy until surgery is decided. (Ex. 4 at PLF350-PLF353).

25. On January 21, 2021, Dr. Crosby set forth his opinions to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia suffered injuries to his left foot from the Collision; the medical treatment provided has been reasonable and medically necessary; and Mr. Kleuchenia will require future medical treatment for his left foot. (Ex. 4 at PLF972-PLF973).

Right Knee Injuries and Treatment

26. On July 18, 2018, Mr. Kleuchenia received an x-ray from Grand Strand Regional Medical Center noting "internal derangement of the right knee." (Ex. 4 at PLF029-PLF037).

27. On September 18, 2018, Mr. Kleuchenia followed up at Access Medical noting persistent ambulatory pain and catching and was referred for orthopedic treatment. (Ex. 4 at PLF082-PLF083).

28. On October 11, 2018, Mr. Kleuchenia was first seen at OrthoSC noting pain and symptoms of popping and clicking. (Ex. 4 at PLF231-PLF234).

29. On November 7, 2018, Mr. Kleuchenia received an MRI confirming a partial ACL and meniscus tear, tibial spine avulsion fracture, and patellofemoral chondromalacia. (Ex. 4 at PLF212-PLF213).

30. On December 5, 2018, Mr. Kleuchenia was seen by Dr. Evans following his MRI initially suggesting a possible ACL reconstruction but recommended attempting conservative treatment before proceeding. He received an initial cortisone injection, was prescribed pain medications, and provided a referral for physical therapy. (Ex. 4 at PLF252-PLF254).

31. On April 10, 2019, Dr. Evans confirmed Mr. Kleuchenia had failed conservative treatment and suggested proceeding with arthroscopic chondroplasty. (Ex. 4 at PLF290-PLF292).

32. On December 16, 2019, Dr. Evans performed a chondroplasty of Mr. Kleuchenia's right knee noting significant inflammation of the synovium in the patellofemoral compartment causing impingement. Dr. Evans shaved and debrided chondromalacia present in the inferior pole

and tibial insertion of the patella. Dr. Evans noted post-operatively that if this procedure did not resolve his symptoms his further recommendation would be ACL reconstruction verse reattachment of the tibial footprint of the ACL. (Ex. 4 at PLF380-PLF381).

33. Mr. Kleuchenia completed post-operative physical therapy with continued complaints. (Ex. 4 at PLF312-PLF314).

34. On January 2, 2020, Dr. Evans reviewed images from the initial surgery noting Mr. Kleuchenia's tibial avulsion fracture was causing impingement on his partially torn ACL during extension and flexion of his knee. (Ex. 4 at PLF312-314).

35. On March 17, 2020, Mr. Kleuchenia followed up again with Dr. Evans noting continued pain in his right knee to be a 4/10. Dr. Evans recommended additional surgery at this time. (Ex. 4 at PLF325-PLF328).

36. On May 11, 2020, Dr. Evans performed a second surgery to address the tibial eminence/tibial spine fracture. Dr. Evans shaved and debrided the tibial spinal fracture and used a trans-osseous suture technique to reattach the tibial footprint. Dr. Evans drilled through the anterior tibia to suture and tied the tibia bone in place. The torn fibers of the ACL and the partially torn meniscus do not appear to be addressed during the procedure. (Ex. 4 at PLF383-PLF385).

37. Mr. Kleuchenia completed additional post-operative physical therapy with some initial improvement before declining and receiving a second opinion. (Ex. 4 at PLF332-PLF334).

38. On October 12, 2021, Mr. Kleuchenia was evaluated by Dr. Kevin Nahigian, M.D., with Carolina Shoulder & Knee Specialists, LLC, with ongoing pain noted to be a 6/10. (Ex. 4 at PLF963-PLF967).

39. Dr. Nahigian performed updated x-rays noting substantial chondral changes in the patellofemoral compartment and suggested repeat chondroplasty to relieve his symptoms. Dr.

Nahigian did not feel ACL reconstruction was necessary at this stage because Mr. Kleuchenia had good stability. (Ex. 4 at PLF963-PLF967).

40. Dr. Nahigian opines Mr. Kleuchenia has incurred a 10% permanent impairment to his right lower extremity as a result of his injuries. (Ex. 4 at PLF967).

41. On September 7, 2020, Dr. Evans set forth his opinions to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia suffered injuries to his right knee as a result of the Collision; the medical treatment provided has been reasonable and medically necessary; and he would require future medical treatment. (Ex. 4 at PLF970-PLF971).

Lower Back Injuries and Treatment

42. Mr. Kleuchenia reported to Grand Strand on the day of the accident with complaints of back pain. (Ex. 4 at PLF029-PLF037).

43. On August 15, 2018, Mr. Kleuchenia followed up at Access Medical noting ongoing lower back pain and received x-rays noting spondylosis with foraminal narrowing at the L5-S1. (Ex. 4 at PLF074-PLF076).

44. On October 10, 2018, Mr. Kleuchenia was seen again at Access Medical noting pain across his lower back that radiates into his bilateral legs rated at an 8/10 and was referred for orthopedic treatment. (Ex. 4 at PLF086-PLF087).

45. On January 8, 2019, Mr. Kleuchenia followed up at Access Medical reporting pain in his low back radiating into his buttocks and legs. His pain is noted to be severe and worsening as an 8-10/10. (Ex. 4 at PLF269-PLF271).

46. On January 11, 2019, Mr. Kleuchenia received an MRI of his lumbar spine noting a right foraminal annular tear and disc protrusion causing mild right foraminal stenosis abutting the exiting nerve root in the foramen at the L4-5; and a central posterior annular tear with disc protrusion causing a ventral indentation on the thecal sac at the L5-S1. (Ex. 4 at PLF273).

47. On January 30, 2019, Mr. Kleuchenia was seen at OrthoSC with pain noted as a constant 6-7/10, affecting his ADL's and life activities. He was recommended physical therapy before undergoing a series of three lumbar transforaminal injections. (Ex. 4, PLF277-PLF279).

48. On July 31, 2019, Mr. Kleuchenia followed up with Dr. Cook noting pain at a 6-8/10 and that his pain affects his ability to walk, sit, stand, drive, do outside activities, and getting dressed. Injections were recommended at this time. (Ex. 4 at PLF293-PLF295).

49. On October 1, 2019, Mr. Kleuchenia received his first lumbar transforaminal epidural steroid injection at the L4-5 and L5-S1 under fluoroscopy. (Ex. 4 at PLF296-PLF297).

50. On October 22, 2019, Mr. Kleuchenia following up reporting no relief from the initial injection and a second injection was administered. (Ex. 4 at PLF301-PLF302).

51. On November 20, 2019, Mr. Kleuchenia followed up again reporting no relief from the second injection and the third injection was not recommended. A surgical evaluation was ordered. (Ex. 4 at PLF303-PLF306).

52. On December 9, 2019, Mr. Kleuchenia was seen by Dr. Cook who reviewed the prior imaging and confirmed its findings of foraminal disc protrusion on the right at the L4-5 that compresses the L4 nerve, and central disc protrusion of the L5-S1. Dr. Cook ordered and updated MRI for further evaluation. (Ex. 4 at PLF307-PLF309).

53. On December 10, 2019, a second MRI of the lumbar spine was completed noting a broad-based annular bulge with right posterior lateral annular tear and disc protrusion creating right exiting foraminal narrowing at the L4-5; broad-based annular bulge with central annular tear, broad-based central disc protrusion at the L5-S1. (Ex. 4 at PLF310-PLF311).

54. On January 8, 2020, Dr. Cook reviewed the MRI confirming its findings but noted it appeared to be stable compared to his prior imaging. Dr. Cook recommended holding on surgery and proceeding with a series of three facet injections at the L4-S1. (Ex. 4 at PLF315-PLF316).

55. On January 21, 2020, Mr. Kleuchenia received an initial lumbar facet injection and a second injection on February 4, 2020. (Ex. 4 at PLF318-PLF321).

56. On February 24, 2020, Mr. Kleuchenia followed up with Dr. Cook reporting no relief from the injections. Dr. Cook recommended conservative treatment including injections, medications, and bracing to hold on surgery for as long as possible. (Ex. 4 at PLF322-PLF324).

57. On September 22, 2021, Mr. Kleuchenia was evaluated by Dr. Steven Poletti, M.D. at Southeastern Spine Institute. Upon review of the imaging, Dr. Poletti confirmed multilevel disc protrusion at the L4-5 and L5-S1 with radiculopathy. (Ex. 4 at PLF968-PLF969).

58. Dr. Poletti opined Mr. Kleuchenia could undergo a discectomy and ankylosis of the L4-5 and L5-S1, but that he should exhaust all conservative treatment options such as L4 selective nerve root blocks and lumbar facet rhizotomy on the right at the L4-5 and L5-S1 before proceeding with any surgery. (Ex. 4 at PLF968-PLF969).

59. Dr. Poletti assigned a 23% whole person impairment as a result of Mr. Kleuchenia's lower back injuries. (Ex. 4 at PLF969).

60. On March 20, 2022, Dr. Cook set forth opinions to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia suffered injuries to his lower back as a result of the Collision; the medical treatment provided has been reasonable and medically necessary; and Mr. Kleuchenia would require future medical treatment for his lower back. (Ex. 4 at PLF974).

Abdomen/Hernia Injuries and Treatment

61. On July 17, 2018, Mr. Kleuchenia was seen at Grand Strand Regional Medical Center with complaints of, among other things, abdominal pain. (Ex. 4 at PLF029-PLF037).

62. On November 11, 2018, Mr. Kleuchenia was seen at Access Medical noting unspecified abdominal pain and referred for a CT scan of the abdomen. (Ex. 4 at PLF095-PLF098).

63. On December 7, 2019, Mr. Kleuchenia followed up at Access Medical with abdominal pain and referred for an x-ray of the abdomen and pelvis. (Ex. 4 at PLF099-PLF102).

64. On December 18, 2019, Mr. Kleuchenia followed up to review his imaging confirming an umbilical hernia and was provided a urology referral. (Ex. 4 at PLF105-PLF107).

65. Mr. Kleuchenia was seen several times at Atlantic Urology for complaints of flank pain and nocturnal enuresis (bedwetting). The records note Mr. Kleuchenia's flank pain and bedwetting are likely the result of his low back injury and the doctors recommended pain management treatment.⁴ (Ex. 4 at PLF936-PLF953).

66. On December 2, 2021, Mr. Kleuchenia was seen by Dr. Gilbertas Rimkus, M.D. at Conway Medical Center and received an updated CT scan of the abdomen, again, confirming the presence of an umbilical hernia. (Ex. 4 at PLF997-PLF1000).

67. On January 4, 2022, Dr. Rimkus set forth opinions to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia's umbilical hernia was the result of the Collision and surgery would be reasonable and medically necessary. (Ex. 4 at PLF1001).

68. On January 12, 2022, Mr. Kleuchenia underwent surgical repair of his hernia with the placement of a mesh. (Ex. 4 at PLF997-PLF1000).

69. In addition to the medical records admitted into evidence, Dr. Todd Joye, M.D., CLCP, testified as an expert in the areas of general medicine, pain management, and life care planning. (Tr. 91:21-25).

70. Dr. Joye testified to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia's injuries to his left foot, right knee, lower back, and hernia were causally related to the Collision. (Tr. 102:5-11).

⁴ Medical records from Access Medical also note possible shifting of the viscera and "floating kidney." (Ex. 4 at PLF105-PLF107). On November 2, 2022, Dr. Ferraro confirmed a shift in Mr. Kleuchenia's kidneys from the supine position to upright position and recommended laparoscopic nephropexy. (Ex. 4 at PLF1032-PLF1033). Mr. Kleuchenia is not requesting compensation for any kidney problems and this issue is not part of his claim for damages.

71. Dr. Joye also testified to a reasonable degree of medical certainty, more likely than not, Mr. Kleuchenia's medical treatment he has received for his left foot, right knee, lower back, and hernia has been reasonable and medically necessary. (Tr. 105:1-6).

72. Mr. Kleuchenia's medical records and bills totaling \$116,875.10 were admitted into evidence as Exhibit 4.

C. Evidence Regarding Future Medical Treatment and Costs

73. Dr. Joye prepared a life care plan and testified to the process and details of the medical recommendations (See Ex. 6; see generally Tr. 87:10-135:15).

74. Dr. Joye testified he used standard methods and procedures accepted in the field of life care planning and in his practice as a physician. (Tr. 94:12-96:7).

75. In addition to the medical records and his own evaluation, Dr. Joye testified he reviewed and relied on the physician statements and evaluations setting forth opinions on causation and future medical treatment. Specifically, Dr. Joye reviewed the physician statement of Dr. Crosby regarding Mr. Kleuchenia's left foot; the physician statement of Dr. Evans regarding Mr. Kleuchenia's right knee; the independent medical evaluation of Dr. Nahigian regarding Mr. Kleuchenia's right knee; the physician statement by Dr. Cook regarding Mr. Kleuchenia's lower back; and the independent medical evaluation by Dr. Poletti regarding Mr. Kleuchenia's lower back. (Tr. 96:15-25; Tr. 97:1-4; see also Ex. 6 at PLF1036-1036).

76. Dr. Joye testified he used his own knowledge and experience as a board-certified pain management physician in preparing the life care plan. (See Ex. 6; Tr. 92:21-25)

77. Dr. Joye's medical cost projection contains the following medical treatment categories: i) physician services; ii) routine diagnostics; iii) medications; iv) laboratory studies; v)

rehabilitation services; vi) equipment and supplies; and vii) additional treatment/surgical treatment. (Ex. 6 at PLF1042-1043; Tr. 119:14-132:19).

78. Dr. Joye testified in detail to each specific recommendation set forth in the life care plan, including the cost, frequency, and duration of each recommendation. (Tr. 119:14-132:19).

79. Dr. Joye testified the treatment set forth in the medical cost projection is causally related to the injuries Mr. Kleuchenia sustained in the Collision. (Tr. 132:20-133:1).

80. Dr. Joye testified, to a reasonable degree of medical certainty, the treatment set forth in the life care is reasonably likely to occur during Mr. Kleuchenia's lifetime. (Tr. 133:2-6).

81. Dr. Joye used the South Carolina Life Expectancy Tables to calculate Mr. Kleuchenia's projected life expectancy and future costs. (Tr. 116:3-12.).

82. The total cost of the treatment set forth by Dr. Joye's life care plan is \$1,160,044.09, before converting the amount to present value and adjusting for inflation. (Ex. 6 at PLF1040).

83. Dr. Joye's life care plan was admitted into evidence as Exhibit 6.

84. Dr. Oliver Wood, Jr., PhD, testified as an expert in economic loss and testified to the value of Dr. Joye's life care plan in present value with adjustment for inflation. (Tr. 140:6-11).

85. Dr. Wood testified he projected the cost of the life care plan out to Mr. Kleuchenia's life expectancy according to the South Carolina Code of Laws, adjusted for the cost for inflation, and discounted the cost to present day value. (Tr. 146:12-148:25).

86. Dr. Wood testified the total present-day value of Mr. Kleuchenia's future medical cost, with adjustment for inflation, is \$799,901.00. (Tr. 148:12-25; see also Ex.7.). The Court took into account Plaintiff's reluctance to have surgery, which reasonably would have alleviated his condition from an economic and noneconomic damages perspective and the verdict reflects that evidence.

D. Evidence Regarding Lost Wages, Loss of Earnings and Earning Capacity, Loss of Employment and Business Opportunities, Loss of Personal Services

87. At the time of the Collision, Mr. Kleuchenia was the owner of Imperial Cab, LLC, where he had operated his own cab service since 2007. (Tr. 24:14-25:1. Tr. 74:25).

88. Mr. Kleuchenia testified he purchased a flatbed truck and began hauling freight in April and May of 2018 for AC Shipping, LLC on a part-time basis. (See Ex. 3; Tr. 26:19-29:6).

89. Mr. Kleuchenia testified he planned to terminate his cab business after the summer of 2018, and move to New Jersey to haul freight for AC Shipping, LLC full-time. (Tr. 30:17-). The Court took into account and carefully considered the speculative nature of Plaintiff's recent employment change shortly before the time of this accident and the verdict reflects the speculative nature of Plaintiff's future employment plans.

90. Mr. Kleuchenia testified he expected to earn at least \$500.00 a day, less approximately \$100.00 a day in expenses. (Tr. 31:4-6).

91. Mr. Kleuchenia testified he has not worked in any capacity since the Collision on July 17, 2018, and has had no income. (Tr. 37:1-20).

92. Cynthia Grimly, MS, CRC, CCM, DABVE, IPEC, performed a vocational evaluation of Mr. Kleuchenia and testified as an expert in the field of vocational evaluations and assessments. (See Ex. 5; Tr. 56:23-85:11).

93. Ms. Grimley testified she performed her vocational evaluation using standard methods accepted in the vocational field, including a transferable skills analysis. (Tr. 64:1-16).

94. Ms. Grimley testified to her process in developing her opinions, including reviewing Mr. Kleuchenia's medical records, physician statements, functional capacity evaluation, and meeting with and interviewing Mr. Kleuchenia, and testified to her findings and opinions in detail. (63:17-85:10).

95. Ms. Grimley testified, to a reasonable degree of vocational certainty, Mr. Kleuchenia has suffered a 100% loss of employability to the competitive labor market because of his injuries from the Collision and that his condition is permanent. (Tr. 81:17; Tr. 82:2-83:2).

96. Ms. Grimley testified she reviewed the affidavit of Alex Yanushko, owner of AC Shipping, LLC, setting forth an offer of employment with expected wages of \$100,000 a year, and that this amount was conservative and reasonable as a car transporter. (Tr. 75:14-77:3).

97. Ms. Grimley's vocational report was admitted into evidence as Exhibit 5.

98. Dr. Joye also testified, in his opinion as a physician, Mr. Kleuchenia could no longer do his job as a cabdriver or car transporter based on his condition. (Tr. 108:7-11).

99. Mr. Kleuchenia testified to his inability to perform household chores such as driving, shopping for groceries, cooking, and cleaning. (Tr. 49:21-52:12).

100. Dr. Joye testified Mr. Kleuchenia's injuries are permanent, and that treatment would not likely change his condition or employability. (Tr. 134:6-135:7).

101. Dr. Wood testified he evaluated Mr. Kleuchenia's financial loss based on Ms. Grimley's vocational report, the affidavit of Alex Yanushko, Dr. Joye's life care plan, and information obtained through interviewing Mr. Kleuchenia. (Tr. 142:13-144:25).

102. Dr. Wood testified, to a reasonable degree of economic certainty, Mr. Kleuchenia has incurred pre-trial loss in earnings of \$560,000.00, and pre-trial loss in personal services of \$24,961.00; for a combined pre-trial economic loss of \$584,961.00. (Ex. 7; Tr. 144:18-145:13).

103. Dr. Wood testified he used the South Carolina Life Expectancy Tables to calculate Mr. Kleuchenia's life expectancy to be 41.16 years at the time of the Collision in evaluating his future losses. (Ex. 7; Tr. 140:20-25).

104. Dr. Wood testified, to a reasonable degree of economic certainty, Mr. Kleuchenia will incur a post-trial loss in earning capacity of \$2,075,614.00, converted to present value. (Tr. 149:1-4).

105. Dr. Wood testified, to a reasonable degree of economic certainty, Mr. Kleuchenia's post-trial loss in personal services is \$106,582.00, converted to present value. (Tr. 149:4-6).

106. Overall, Dr. Wood testified Mr. Kleuchenia's total financial loss of earnings and loss or earning capacity is \$2,635,614.00; total loss of personal services is \$131,543.00; for a total economic loss of \$3,566,259.00, converted to present value and exclusive of any past medical expenses incurred. (Ex. 7; Tr. 149:1-14).

E. Evidence Regarding Noneconomic Damages -- Pain and Suffering, Mental Anguish, Loss of Enjoyment of Life, Permanent Impairment, Other Non-Pecuniary Losses

107. Mr. Kleuchenia testified that prior to the Collision he was sociable and active. He enjoyed going to cookouts and out to eat with friends. He enjoyed riding his bike for exercise, working on vehicles, and gardening. (Tr. 23:17-24:5).

108. Mr. Kleuchenia's medical records consistently note pain in his left foot to constantly be anywhere from a 6-8/10 and described as "aching, stabbing, and sharp" (Ex. 4 at PLF342). His right knee pain is constantly noted to be anywhere from a 4-6/10 and described as "sharp." (Ex. 4 at PLF965). His lower back pain is constantly noted to be "severe" and rated anywhere between a 6-10/10, while described as "burning, stabbing, sharp, constant" ... with radiating pain, numbness, and tingling into his bilateral legs and that "nothing helps" alleviate pain. (See Ex. 4 at PLF308).

109. The medical records further document his pain is aggravated by sitting, standing, walking, lifting, carrying, twisting, range of motion, and going from sitting to standing. (See Ex. 4 at PLF308). Dr. Cook notes his injuries affect his activities of daily living and life activities. (See

Ex. 4 at PLF278). Dr. Cook further noted his pain affects his ability to walk, sit, stand, drive, do outside activities, and getting dressed. (Ex. 4 at PLF293-PLF295).

110. Mr. Kleuchenia testified he continues to have pain in his left foot after being on his feet for more than twenty (20) to forty (40) minutes, depending on the activity. He uses an ice bucket with cold water to ice his left foot every day. He feels his left foot injury is getting worse and he is currently prescribed medications for gout. (Tr. 38:23-40:12).

111. Mr. Kleuchenia testified he continues to have pain in his right knee. He is conscious about his knee when on his feet to not cause further injury and can't be upright for more than one hour because of his knee. He continues to have clicking and popping in the right knee. He uses handrails for stairs and when descending stairs and uses one stair at a time. He feels his right knee injury is getting worse. (Tr. 41:22-42:19).

112. Mr. Kleuchenia testified he continues to have constant and significant pain in his lower back and can't be upright, standing or sitting, for more than approximately one hour before having to lay down due to pain. The only relief is laying down. He feels his lower back condition is getting worse. (Tr. 45:19-45:10).

113. Mr. Kleuchenia and Dr. Joye testified his back pain is so significant he spends every day restrained to his bed and cannot be upright for more than forty-five (45) minutes to an hour without having to lay down. (Tr. 45:2-10; Tr. 157:1-6).

114. Mr. Kleuchenia testified he suffers from persistent diarrhea and bedwetting since the Collision which his doctors have contributed to his lower back injury. (Tr. 46:20-47:8;).

115. Mr. Kleuchenia testified he gets unbearable pain when standing after several minutes. He also has pain and limitations with bending, lifting, or carrying objects and bought a four-wheel hand truck to carry items from his car to his apartment. (Tr. 45:19-25; Tr. 50:15-25).

116. Mr. Kleuchenia testified his injuries affect his ability to drive any significant distance. He does not drive long distances anymore but testified he has had to travel for a doctors' appointments that required him to pull over and lay down in his vehicle. (Tr. 50:10-51:1).

117. Mr. Kleuchenia worries about his future medical status, the recommended surgeries, and whether those treatments will make him better or worse. He worries about how he is going to support himself financially. (Tr. 46:4-8; Tr. 51:2-4).

118. Mr. Kleuchenia is no longer active and unable to exercise. He has not ridden his bicycle since the Collision and has gained forty (40) to fifty (50) pounds since the accident. (Tr. 48:21-25; Tr. 51:5-10).

119. Mr. Kleuchenia no longer cooks like did prior to the Collision because he can't be upright on his feet long enough. He has a friend who allows him to pick up food from a buffet or he purchases premade meals. (Tr. 51:11-19).

120. Mr. Kleuchenia is unable to adequately clean his apartment and has issues with vacuuming, sweeping, and dusting. He testified his apartment is dirty and cluttered since the Collision and he is too embarrassed to have people over due to its condition. (Tr. 51:20-52:12).

121. Mr. Kleuchenia does not participate in social events because he cannot be on his feet long enough. Even the time he can be up he does not enjoy being there because he is in pain. He testified specifically to an event in February of this year where he was at a friend's house and fell over because of his back pain, was forced to lay down and his friends wanted to call the ambulance for him. (Tr. 52:24-53:3).

122. Mr. Kleuchenia testified he has pain even when sitting upright for periods of time and cannot enjoy social events such as going to see a movie. (Tr. 53:4-17).

123. Mr. Kleuchenia testified he has not traveled to see his parents in Belarus since the Collision because of his condition. His parents are elderly and in their seventies. (Tr. 53:18-54:2)

124. Mr. Kleuchenia testified he feels like his life has changed and he is unable to enjoy anything because he must stay in bed all day. (Tr. 54:3-17).

125. Mr. Kleuchenia testified prior to the Collision he was dating and had hopes of remarrying and having children. He no longer dates and feels he cannot be a boyfriend or husband in his condition. (Tr. 54:18-55:5).

126. Mr. Kleuchenia's testimony is consistent with the information in Ms. Grimley and Dr. Joye's reports, along with their testimony regarding his functional limitations. (See Ex. 5 and 6; see also Tr. 56:23-135:17).

III. CONCLUSIONS OF LAW

A. Liability

The Court has entered summary judgment on the issue of liability.

B. Damages

Actual damages – consisting of economic and noneconomic damages – includes compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant. Rogers v. Florence Printing Co., 233 S.C. 567, 107 S.E.2d 258 (1958).

In determining the amount of compensation for the Plaintiff's injuries, it is proper to consider past, present, and future aspects of the injuries. See Todd v. Joyner, 385 S.C. 509, 518, 685 S.E.2d 613, 618 (Ct. App. 2008); Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001). The principle underlying compensation for future damages is that only one action can be brought and, therefore, only one recover had. A Plaintiff's life expectancy should be considered in assessing future damages. See id.; see also S.C. Code Ann. § 19-1-150.

Economic damages consist of any pecuniary damages such as past and future medical expenses, loss of earnings and earning capacity, loss of income, costs of obtaining substitute

domestic services, loss of personal services, loss of employment, loss of business or employment opportunities, and other monetary losses. See S.C. Code § 15-32-210(3).

"It is a fundamental principle of law of damages that a person who suffers personal injuries because of the negligence of another is entitled to recover the reasonable value of medical care and expenses incurred for the treatment of the injuries to the time of trial." Haselden v. Davis, 341 S.C. 486, 491, 534 S.E.2d 295, 298 (Ct. App. 2000).

A person who suffers personal injuries because of the negligence of another is entitled to recover the reasonable full market value of medical care and expenses that are reasonably certain to occur in the future. Pearson v. Bridges, 344 S.C. 366, 544 S.E.2d 617 (2001). The plaintiff does not have to prove that these future expenses are more likely than not to occur in the future, only that they are reasonably likely to occur. See id.

Lost wages and loss of future income and earning capacity are proper elements of compensation. See S.C. Code Ann. § 15-32-210(3); see also Matthews v. Porter, 239 S.C. 620, 622, 124 S.E.2d 321, 322 (1962). This requires a consideration of all matters that relate to the issue of disability, the effect which that disability will have on Plaintiff's capacity to work, the extent to which the disability will impair the Plaintiff's earning capacity, the present value of all losses due to his impaired earning power, any loss in the ability to perform household services, and any such losses reasonably certain to result in the future from his injuries. See id.; see also Steeves v. U.S., 249 F. Supp. 446 (D.C.S.C. 1968).

Noneconomic damages include "damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, other nonpecuniary damages, and any other theory of damages including, but not limited to, fear of loss, illness, or injury." S.C. Code Ann. § 15-32-210(9).

An award for pain and suffering compensates the injured person for the physical discomfort and emotional response to the sensation of pain caused by the injury. See Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001). In determining the award, is proper to consider the nature and extent of injuries and duration of suffering; the age, health, habits, and conditions of the injured party before the injuries; the use of sedatives or drugs to relieve pain; and any aggravation of pre-existing conditions. See id.

Mr. Kleuchenia presented for medical treatment following the accident with pain in multiple body parts and diagnosed with dyspnea (shortness of breath) due to pain in his chest. He has continued to endure pain in multiple body parts since the Collision. His pain is constantly documented throughout the medical records as 6-8/10 for his left foot, a 4-6/10 for his right knee, and a 6-10/10 for his lower back. The medical records further note the pain in his lower back is constant with no relief. Dr. Cook noted his pain affects his activities of daily living, and limits his ability to walk, sit, stand, drive, do outside activities, and getting dressed.

Mr. Kleuchenia's, Ms. Grimley's and Dr. Joye's testimony confirm his lower back pain is so significant he cannot be upright or on his feet for more than approximately one hour. Likewise, evidence shows that Mr. Kleuchenia continues to have left foot and right knee pain despite the limited amount of time he can be on his feet. The Court makes note that Mr. Kleuchenia had to take a break early in his testimony so he could lay down and provide relief for his lower back.

The medical records and Mr. Kleuchenia's testimony establish his pain is worsening in his left foot, right knee, and lower back. Moreover, the evidence establishes Mr. Kleuchenia's condition to the left foot, right knee, and lower back are all permanent conditions, which will cause ongoing pain and suffering, including likely surgeries to each body part that will result in further pain and suffering. The Court also takes into consideration his abdominal pain noted from the date of the Collision and resulting hernia surgery in assessing its award for pain and suffering.

An injured party may also recover for the corresponding mental suffering which flows as a natural consequence of the wrongful act. See id. "Mental anguish" includes the mental sensation of pain and the accompanying feelings of distress, fright, anxiety, disappointment, anger, worry, resentment, embarrassment, grief, severe disappointment, indignation, anxiety, depression, wounded pride, shame, despair, and humiliation. See id.

As previously noted, Mr. Kleuchenia suffers from continuing pain in multiple body parts that is likely to remain throughout his lifetime and affect his daily life. Mr. Kleuchenia will have to endure his injuries and their effects every day, for the rest of his life. He has incurred multiple surgeries to date and faces many more in the future. He suffers from persistent diarrhea and bedwetting since the Collision.

Mr. Kleuchenia experiences anxiety when driving and worries about his future condition and finances. Dr. Joye described him as a "recluse," being restrained to a bed and having no social engagement. He feels he would be a burden as a companion and would not be able to contribute as a potential boyfriend, husband, or father.

An injured party may recover damages for "loss of enjoyment of life" which is intended to compensate for the limitations on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or the individual's inability to pursue talents, interests, hobbies, or avocations. See Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001) ("Loss of enjoyment of life" is a compensable element, separate and apart from pain and suffering.).

Mr. Kleuchenia is no longer able to participate in and enjoy simple social events such as cookouts, gatherings, going out to eat, or movies with friends. He is no longer able to exercise and ride his bike and has gained at least forty (40) pounds since the Collision. The evidence in totality establishes that Mr. Kleuchenia now spends every day at home, lying in bed, without much social

contact or engagement. He cannot leave his house for much more than one hour at a time before having to return or find some way of laying down to relieve his pain.

Mr. Kleuchenia's injuries have also affected his family relationships and goals. He has not been able to visit his elderly parents in Belarus since the Collision because of his injuries and worries he may never see them again before they pass. Mr. Kleuchenia testified that prior to the Collision he was dating and had hopes of remarrying and having children. He now has no dating life and feels that having any type of relationship is impossible because of his condition.

The evidence presented establishes that Mr. Kleuchenia is severely limited in his ability to engage in any meaningful or enjoyable activities because of his injuries and that his relationships have been significantly affected and will continue to be affected.

S.C. Code Ann. § 15-32-210(9) provides compensation for any physical impairment suffered by an injured person. See also Todd v. Joyner, 385, S.C. at 518 ("actual damages include [among others] ... impairment of health or physical condition.").

Dr. Nahigian evaluated Mr. Kleuchenia and assigned a 10% permanent impairment to his right lower extremity pursuant to the AMA Guides. Dr. Poletti evaluated Mr. Kleuchenia and assigned a 23% permanent impairment to his whole person resulting from his lower back injury pursuant to the AMA Guides. An impairment rating has not been addressed for his left foot, but the evidence establishes there would likely be some amount of permanent impairment.

Mr. Kleuchenia's physical impairment is consistently documented throughout the evidence including, but not limited to, medical records, physician statements, functional capacity evaluation, vocational report, life care plan, and witness testimony. Mr. Kleuchenia is severely impaired in his physical function and abilities, causing him to be largely bedridden. Mr. Kleuchenia continues to suffer from impairment in his left knee and lower back.

S.C. Code Ann. § 15-32-210(9) further sets forth compensation for any other non-pecuniary loss including, but not limited to, inconvenience, disfigurement, permanent scarring, and fear of loss, illness, or injury.

Based on the evidence, Mr. Kleuchenia has attended over eighty (80) physician appointments with numerous doctors and countless physical therapy visits. He has undergone three surgeries to date and needs two additional surgeries currently. He will likely require at least three additional surgeries later in his lifetime, all of which will likely result in some degree of pain, suffering, mental anguish, and scarring. Once all said and done, Mr. Kleuchenia will have hardware in his left foot (joint replacement), right knee (joint replacement), lower back (two level discectomy and fusion), and abdomen (mesh).

The Court finds Mr. Kleuchenia has been substantially inconvenienced and will continue to be inconvenienced due to his need for ongoing medical treatment. Mr. Kleuchenia testified that he worries about the recommended future surgeries and potential outcome of those procedures. He also worries about his inability to work and how he will support himself financially in the future.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes that Mr. McLeod is liable to Mr. Kleuchenia in the amount of Three Million Two Hundred Fifty Thousand and 00/100 Dollars (\$3,250,000.00).

This total is comprised of past medical damages, future medical damages, lost wages and loss of earnings, loss of personal services, past and future pain and suffering, mental anguish, loss of enjoyment of life, permanent impairment, and all other non-pecuniary aspects of his loss taking into consideration injuries to multiple body parts, the effects of his injuries, and his life expectancy of 41.16 years at the time of the Collision.

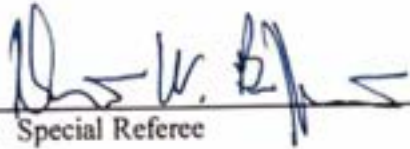
The Court further finds Mr. McLeod is entitled to a setoff pursuant to S.C. Code Ann. § 38-77-160 in the amount of \$1,000,000.00, which represents the full amount of liability coverage.

WHEREFORE, the Court finds in favor of Mr. Kleuchenia in the amount of \$3,250,000.00, less a setoff of \$1,000,000.00, for a **Net Judgment of \$2,250,000.00** with judgment to be entered and interest to begin accruing upon entry.

AND IT IS SO ORDERED.

May 29, 2024

Myrtle Beach, SC

By:  Special Referee

Robert W. Buffington (SC Bar # 7825)

2411 North Oak Street, Suite 305-F

Myrtle Beach, South Carolina 29577

Tel: (843) 443-4019

Email: bobby@bufflawfirm.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Viktar Kleuchenia,

PLAINTIFF,

v.

Texas Insurance Company, as successor of
Onyx Insurance Company, Inc., a Risk
Retention Group,

DEFENDANT

C/A No. 24-av-99999

Notice of Removal

UIM Carrier, Texas Insurance Company, as successor of Onyx Insurance Company, Inc., a Risk Retention Group, (“the Defendant”) files this Notice of Removal to remove this action from the Horry County Court of Common Pleas to this Court, pursuant to 28 U.S.C. §§ 1332(a)(1) and 1441(b).

1. On August 17, 2021, the Plaintiff filed a Complaint in the Horry County Court of Common Pleas. A copy of the Complaint is attached.

2. UIM Carrier, Texas Insurance Company, as successor of Onyx Insurance Company, Inc., a Risk Retention Group, received a copy of the Complaint via undersigned Counsel on September 30, 2024, making the filing of this Notice timely pursuant to 28 U.S.C. § 1446(b).

3. This is a civil action over which this Court has original and removal jurisdiction under 28 U.S.C. §§ 1332(a)(1) and 1441(b). Specifically, the Plaintiff is, upon information and belief, a citizen of the state of South Carolina. Defendant is a company of the state of Texas. They seek unspecified actual and punitive damages; the Plaintiff did not place a limit on the damages sought; and therefore the amount in controversy exceeds the sum of \$75,000.

4. A copy of this Notice of Removal will be served on the Plaintiff, as required by 28 U.S.C. § 1446(d).

5. A copy of this Notice of Removal will be filed with the Clerk of Court for the Horry County Court of Common Pleas, as required by 28 U.S.C. § 1446(d).

WHEREFORE, the Defendant removes this action to this Court's jurisdiction.

GRIFFITH, FREEMAN & LIIPFERT, LLC

s/Michael D. Freeman

Michael D. Freeman (Fed. ID #9402)

600 Monson Street

PO Drawer 570

Beaufort, SC 29901

843-521-4242

843-521-4247 (fax)

mfreeman@griffithfreeman.com

ATTORNEYS FOR TEXAS INSURANCE
COMPANY, AS SUCCESSOR OF ONYX
INSURANCE COMPANY, INC., A RISH
RETENTION GROUP

October 7, 2024
Beaufort, South Carolina

CERTIFICATE OF SERVICE

I certify that on October 7, 2024, I served the *Notice of Removal* on the following by depositing it in the United States mail, with postage prepaid and addressed as follows:

Jared C. Williams
Law Office of Jared C. Williams
PO Box 403
Mount Pleasant, SC 29456

Re:
24-av-99999

s/Anna J Beckham
Anna J Beckham

Beaufort, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	CASE NO.: 2021-CP- 26-04596
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	PLAINTIFF’S MOTION FOR SUMMARY
	)	JUDGMENT ON LIABILITY
v.	)	
	)	
BRIAN MCLEOD,	)	
	)	
Defendant.	)	

WILL YOU PLEASE TAKE NOTICE, that pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, Plaintiff Viktor Kleuchenia (“Plaintiff”), moves this Court for an Order granting summary judgment as there is no genuine issue of material fact regarding Defendant Brian McLeod’s (“Defendant”) liability and Plaintiff is entitled to judgment as a matter of law.

UNDISPUTED FACTS OF THE CASE

The facts of the case are undisputed. This case arises out of a motor vehicle collision occurring on July 17, 2018. Plaintiff was traveling north on Highway 17 when Defendant made a left-hand turn off 52nd Avenue to head south on Highway 17. (See Exhibit A, McLeod Depo. 11:3-23). Defendant pulled out in front of Plaintiff, causing the front of Plaintiff’s vehicle to impact the driver side of Defendant’s vehicle at a high rate of speed. (See *id.*). Plaintiff suffered significant injuries and filed suit alleging negligence, negligence *per se*, and gross negligence.

STANDARD FOR REVIEW

“Summary judgment is appropriate where there is no genuine issue of material fact, and it is clear that the moving party is entitled to judgment as a matter of law. Bank of N.Y. v. Sumter County, 387 S.C. 147, 154-55, 691 S.E.2d 473, 477 (2010). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue

of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). The party opposing summary judgment must set forth specific facts showing there is a genuine issue of fact for trial. Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 315-16, 372 S.E.2d 120, 122 (Ct. App. 1998).

LEGAL ANALYSIS

A cause of action for negligence arises from the concurrence of three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) the defendant's breach of that duty by a negligent act or omission, i.e., failure to exercise the care of a reasonable man in the circumstances; and (3) damage proximately resulting from the breach of duty. South Carolina Insurance Co. v. James C. Greene, Inc., 290 S.C. 171, 176, 348 S.E. (2d) 617, 620 (Ct. App. 1986). The duty of care is that standard of conduct the law requires of an actor in order to protect others against the risk of harm from his actions. It embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable and which can be avoided by the defendant's exercise of reasonable care. Carolina Winds Owners' Association, Inc. v. Joe Harden Builder, Inc., 297 S.C. 74, 374 S.E. (2d) 897 (Ct. App. 1988).

A. Defendant Owed Plaintiff a Duty of Care in Operating His Motor Vehicle.

Defendant has a duty to yield to the favored driver, Plaintiff, before crossing lanes. See S.C. Code Ann. 56-5-1900 (Supp. 2000). Defendant has a duty to adjust his speed to conditions and hazards. See S.C. Code Ann. 56-5-1520 (Supp. 2000). Defendant has a duty to keep a reasonable lookout to avoid hazards on the highway. See 60A C.J.S. *Motor Vehicles* 247, 343 (1969) (Driver has a common law duty to keep a reasonable lookout to avoid hazards); Cf. Brown v. Howell, 284 S.C. 605, 327 S.E.2d 659 (1985) (Motorists must use ordinary care in keeping a proper lookout for vehicles approaching an intersection).

Defendant clearly owed a duty to Plaintiff to yield to his right-of-way and to keep a proper lookout when operating his motor vehicle while making a left-hand turn across two lanes of traffic.

B. Defendant Admits He Breached his Duty of Due Care Owed to Plaintiff.

Defendant breached his duty to yield to Plaintiff's right-of-way and to keep a proper lookout by crossing traffic to make a left-hand turn and pulling out in front of Plaintiff's vehicle. Defendant admits fault in his deposition.

Q: And I assume you would agree that if you're crossing traffic to make a left-hand turn from a stop sign, you have to make sure that there's a clear path before proceeding---

A: Absolutely, yes.

Q: --- to turn left? Okay. I'll just ask you: Do you contend that my client was at fault in any way for the accident?

A: No, it was, it was my fault.

(See Exhibit A, McLeod Depo. 13:13-24; 14:1-7).

Defendant further admits liability in *Defendant's Responses to Plaintiff's First Set of Requests For Admissions*. See Rule 36(b), SCRPC ("Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."); see also Adams v. Orr, 260 S.C. 92, 194 S.E.2d 232 (1973) (In form and substance a request to admit is comparable to an admission in pleadings or stipulation of facts and as such is generally regarded as a judicial admission rather than evidentiary admission of a party.).

Specifically, Defendant admits he failed to keep a proper look out while operating his motor vehicle, failed to yield to the right-of-way of Plaintiff's vehicle, and that he was negligent in operating his motor vehicle. (See Exhibit B, Responses No. 1, 2, and 3).

C. Defendant Admits Plaintiff Suffered Injuries Proximately Caused by His Negligence

Defendant further admits his negligence proximately caused the accident and Plaintiff suffered injuries as a direct and proximate result of the accident. (See Exhibit B, Responses No. 4,

5, 9, and 10). Lastly, Defendant admits he is solely liable for the accident and neither Plaintiff nor any third-party person or entity is liable for the accident. (See Responses No. 6, 7, and 8).

CONCLUSION

The facts of the case are undisputed, and Defendant admits liability. There is no genuine issue of material fact that: i) Defendant owed Plaintiff a duty of due care; ii) Defendant breached his duty of due care owed to Plaintiff; and iii) Plaintiff suffered injuries as a direct and proximate result of Defendant's negligence. As such, summary judgment is appropriate on the issue of liability and the only issue remaining is that of damages.

WHEREFORE, Plaintiff respectfully requests the Court enter an Order for summary judgment on the issue of Defendant's liability for Plaintiff's negligence cause of action and have the sole remaining issue be one of damages.

Respectfully submitted,

s/Jared C. Williams

Jared C. Williams

S.C. Bar No. 100806

P.O. Box 403

Mount Pleasant, SC 29465

(843) 991-6528 – Office

(803) 429-3393 – Mobile

jared@williamslawsc.com

Attorney for the Plaintiff

April 10, 2023
Charleston, South Carolina

EXHIBIT A

DEPOSITION TRANSCRIPT OF DEFENDANT BRIAN MCLEOD

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY) CASE NO: **2021-CP-26-04596**

VIKTAR KLEUCHENIA,)
)
 Plaintiff,)
)
-versus-)
)
BRIAN MCLEOD,)
)

 Defendant.)

**THE ZOOM DEPOSITION
OF
BRIAN MCLEOD**

Friday, March the 11th, 2022
3:21 p.m. – 3:36 p.m.

The Zoom deposition of **BRIAN MCLEOD**, taken on
the 11th day of March 2022, at his residence located at
7327 Hillsboro Court, Canton, Michigan 48187.

CP-26 REPORTING

Melissa M. Stoneking, Court Reporter/Owner
PHONE: (843) 446-1691
EMAIL: melissastoneking@cp26reporting.com

1 Q: Okay.

2 A: Nothing like that.

3 Q: All right. Just in your own words, tell
4 me what happened in regard to how the
5 accident ---

6 A: At this intersection, I, I can't recall
7 the names of the two streets, but it's
8 like a side street that comes out to a
9 main road. We had come out of the
10 subdivision. Came up to, I believe it's
11 19, is the road, sort of like a divided
12 highway. We were trying to turn left
13 and were at a stop sign. And the view
14 to the left for traffic, I believe,
15 coming from the north, no, coming from
16 the south. I'm, I'm sorry. I'm turning
17 myself around. It was difficult to see.
18 We kept inching out little bit by little
19 bit. Tried to time it. Cars were
20 piling up behind me. Thought it was
21 clear. I couldn't see a thing, and as I
22 came out, obviously there was a car
23 coming.

24 Q: Okay. So, you pulled up. You had a
25 stop sign. And then traffic that was

CP-26 REPORTING

Melissa M. Stoneking, Court Reporter/Owner
PHONE: (843) 446-1691
EMAIL: melissastoneking@cp26reporting.com

1 coming in the left-hand direction, there
2 was no stop sign or traffic device for
3 that traffic, correct?

4 A: Correct, yes.

5 Q: Okay. So, the traffic coming down
6 Highway 17 from the left would have the
7 right of way at that point, right?

8 A: Yes, yes.

9 Q: And then you said that it was difficult
10 to see, and you said there was some
11 trees or brush ---

12 A: Trees and brush. I remember trees and
13 they were actually hanging over into the
14 road. And it just -- as you're sitting
15 in the truck, you're up high, which made
16 it even more difficult because I'm, you
17 know, I'm getting up higher on the tree.
18 But we did our best to try to get out
19 the -- and I was, came through the wrong
20 one.

21 Q: Do you have any estimate sort of how far
22 a view you had seat wise down the road?

23 A: I, to be honest, I can't recall that.

24 Q: Okay. And so, you essentially just --
25 and I don't want to use your own words

CP-26 REPORTING

Melissa M. Stoneking, Court Reporter/Owner
PHONE: (843) 446-1691
EMAIL: melissastoneking@cp26reporting.com

1 or put words in your mouth, but you
2 essentially kind of had to guess when
3 traffic was cleared?

4 A: Honestly, yes. I was trying to time it.
5 I mean, we could see some -- I could see
6 more of the, I'll say the left-hand
7 lane. The lane that's furthest away
8 from the, from the sidewalk. You know,
9 because as, as the angle, you could see
10 easier on that one and that's what I was
11 judging off of, but I couldn't see much
12 of that inside lane.

13 Q: Do you recall if there was a property,
14 or a business, or anything to the left
15 where there was a tree that was
16 obstructing the view or anything like
17 that?

18 A: I, I don't recall that. I just remember
19 the tree, or brush, or something
20 blocking it, but I, I couldn't tell you
21 if it was a house, or a business, or
22 anything.

23 Q: And I assume you would agree that if
24 you're crossing traffic to make a left-
25 hand turn from a stop sign, you have to

CP-26 REPORTING

Melissa M. Stoneking, Court Reporter/Owner
PHONE: (843) 446-1691
EMAIL: melissastoneking@cp26reporting.com

1 make sure that there's a clear path
2 before proceeding ---

3 A: Absolutely, yes.

4 Q: --- to turn left? Okay. I'll just ask
5 you: Do you contend that my client was
6 at fault in any way for the accident?

7 A: No, it was, it was my fault.

8 Q: Okay. And if I understand correctly,
9 the front of his vehicle impacted
10 directly with your driver's side vehicle
11 where you were sitting, right?

12 A: Yes.

13 Q: Okay. Did any airbags in your vehicle
14 deploy or anything like that?

15 A: Yeah, both airbags in the front
16 deployed.

17 Q: Okay. Side airbags at all?

18 A: You know what, I, I don't recall.

19 Q: Okay.

20 A: I remember the two front, seeing them
21 for sure, but I don't recall seeing the
22 sides.

23 Q: Tell me what happened immediately after
24 the accident.

25 A: Right after the accident, we were spun

CP-26 REPORTING

Melissa M. Stoneking, Court Reporter/Owner
PHONE: (843) 446-1691
EMAIL: melissastoneking@cp26reporting.com

EXHIBIT B

DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS
FOR ADMISSIONS

THOMPSON
& HENRY, P.A.
ATTORNEYS AT LAW

1300 SECOND AVENUE, THIRD FLOOR
POST OFFICE BOX 1740
CONWAY, SOUTH CAROLINA 29528

G. MICHAEL SMITH
MSMITH@THOMPSONLAW.COM

TELEPHONE
(843) 248-5741
FACSIMILE
(843) 248-5112

March 28, 2022

Jared C. Williams, Esq.
Law Offices of Jared C. Williams, LLC
P.O. Box 403
Mt. Pleasant, SC 29465

RE: Viktar Kleuchenia v. Brian McLeod
Civil Action No.: 2021-CP-26-04596
Date of Loss: 7/17/2018
Claim No.: 0381848190101049
Our File No.: 14364.84

Dear Mr. Williams:

I am enclosing the Defendant's Responses to Plaintiff's First Set of Requests for Admissions in connection with the above captioned matter with proper proof of service.

Very truly yours,

Mike

G. Michael Smith

GMS/kwn
cc: Brian McLeod
Mona Amos

ELECTRONICALLY FILED - 2023 Apr 10 9:34 AM - Horry - COMMON PLEAS - CASE#2021CP2604596

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO.: 2021-CP-26-04596
Viktar Kleuchenia,	)	
	)	
Plaintiff,	)	DEFENDANT'S RESPONSES TO
	)	PLAINTIFF'S FIRST SET OF
vs.	)	REQUESTS FOR ADMISSIONS
	)	
Brian McLeod,	)	
	)	
Defendant.	)	
	)	

TO: PLAINTIFF AND JARED C. WILLIAMS, ESQ., ATTORNEY FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant, responding to the Plaintiff's First Set of Requests for Admissions, would state as follows, pursuant to Rule 36, *South Carolina Rules of Civil Procedure*:

1. Please admit that Defendant failed to keep a proper look out while operating his motor vehicle at the time of the collision.

RESPONSE: Admit

2. Please admit that Defendant failed to yield to the right-of-way of Plaintiff's vehicle at the time of the collision.

RESPONSE: Admit

3. Please admit that Defendant was negligent in operating his motor vehicle in one or more ways at the time of the collision.

RESPONSE: Admit

4. Please admit that Defendant's negligence proximately caused the collision.

RESPONSE: Admit

5. Please admit that Defendant is at fault and, therefore, liable for the collision.

RESPONSE: Admit

6. Please admit that Plaintiff is not at fault and, therefore, is not liable for the collision.

RESPONSE: Admit

7. Please admit that there is no third-party person or entity that is liable for the collision.

RESPONSE: Admit

8. Please admit that Defendant is solely liable for the collision.

RESPONSE: Admit

9. Please admit that Plaintiff suffered injuries as a direct result of the collision.

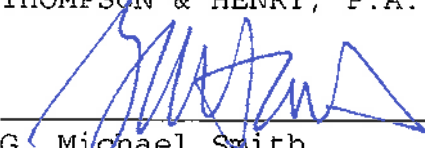
RESPONSE: Admit

10. Please admit that Plaintiff suffered injuries proximately caused by the collision.

RESPONSE: Admit

(signature on following page)

THOMPSON & HENRY, P.A.



G. Michael Smith
SC Bar No. 5255
1300 Second Ave., 3rd Floor
Post Office Box 1740
Conway, SC 29528
Phone: (843) 248-5741
Fax: (834) 248-5112
msmith@thompsonlaw.com

ATTORNEYS FOR THE DEFENDANT

Conway, South Carolina

March 28, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO.: 2021-CP-26-04596
Viktar Kleuchenia,	)	
	)	
Plaintiff,	)	
	)	CERTIFICATE OF SERVICE
vs.	)	
	)	
Brian McLeod,	)	
	)	
Defendant.	)	
_____	)	

I, Kimberly Nobles, an employee for Thompson & Henry, P.A., attorneys for the Defendant in the above-captioned action and/or actions, certify that I have this 28 day of March, 2022, mailed a copy and/or copies of the following:

1. Defendant's Responses to Plaintiff's First Set of Requests for Admissions

to the undersigned at his/her address(es) of record, with sufficient postage attached thereto, as follows:

Jared C. Williams, Esq.
Law Offices of Jared C. Williams, LLC
P.O. Box 403
Mt. Pleasant, SC 29465



Kimberly Nobles

Conway, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	CASE NO.: 2021-CP- 26-04596
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	PLAINTIFF’S MOTION TO STRIKE
	)	DEMAND FOR JURY TRIAL AND
v.	)	REQUEST FOR ORDER OF REFERENCE
	)	
BRIAN MCLEOD,	)	
	)	
<u>Defendant.</u>	)	

COMES NOW, Plaintiff Viktor Kleuchenia (“Plaintiff), pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, respectfully moving the Court for an order to strike his demand for a jury trial in his Complaint and request the appointment of a special referee. The basis of Plaintiff’s motion is as follows:

1. This case arises out of a motor vehicle accident occurring on July 17, 2019, in Horry County, South Carolina.
2. Defendant Brian McLeod (“Defendant”) was insured by a liability policy with GEICO Indemnity Insurance Company (“GEICO”). Plaintiff had additional underinsured motorist (UIM) coverage with ONYX Insurance Company at the time of the accident.
3. On July 12, 2021, Plaintiff filed his Summons and Complaint against Defendant which included a demand for a jury trial.
4. On July 21, 2021, Plaintiff personally served Defendant with a copy of the Summons and Complaint and GEICO retained control of the defense through attorney G. Michael Smith, Esq., with the law firm of Thompson & Henry, PA.

5. On August 17, 2021, Plaintiff also served Onyx Insurance Company, as Plaintiff's UIM carrier, through the South Carolina Department of Insurance, pursuant to S.C. Code § 38-77-160. (See Exhibit A, Acknowledgment of Service).

6. Onyx Insurance Company did not file a notice of appearance or retain counsel to appear in the case upon being served with the Summons & Complaint.

7. Plaintiff subsequently learned that Texas Insurance Company had assumed all obligations and liabilities of ONYX Insurance Company effective June 30, 2021.

8. Out of an abundance of caution, Plaintiff served Texas Insurance Company with a copy of the Summons and Complaint through the South Carolina Department of Insurance pursuant to S.C. Code § 38-77-160. (See Exhibit B, Acknowledgement of Service).

9. Texas Insurance Company has not filed a notice of appearance or retained counsel to appear in the case since being served with the Summons & Complaint.

10. On January 25, 2023, Plaintiff and Defendant reached a settlement with Defendant's liability carrier through the acceptance of an Offer of Judgment filed with the Court.

11. Plaintiff is now continuing his claim to pursue additional UIM benefits against Texas Insurance Company, as assignee of Onyx Insurance Company.

12. S.C. Code Ann. § 38-77-160, which governs the liability of UIM carriers, provides in relevant part, "[t]he insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and *has thirty days after service of process on it to appear.*" See Ex Parte Allstate, 399 S.C. 202 (S.C. Ct. App. 2000) (emphasis added).

13. ONYX Insurance Company and/or Texas Insurance Company has not filed a notice of appearance in the case or assumed control of the defense at this time and has waived its right to appear pursuant to § 38-77-160.

14. Rule 53(b), *SCRCP*, provides in relevant part, that “in an action where the parties consent ... a case may be referred to a master or special referee by order of the circuit judge or the clerk of court. Rule 53(b) further notes that “[i]n all other cases, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case.”

15. Defendant has admitted liability and the appointment of a special referee would be appropriate to proceed forward on the sole issue of damages. (See Exhibit C).¹

16. There is no party to the case that objects to Plaintiff’s request for a special referee.

17. Plaintiff respectfully requests the Court enter an Order striking Plaintiff’s request for a jury trial demand in his Complaint and have the case assigned to a special referee for purposes of determining damages.

18. To the extent the Court would request a recommendation for someone to serve as special referee, Plaintiff would recommend the appointment of Bobby Buffington, Esq. to serve as special referee for the purpose of assessing damages in this case.

Respectfully submitted,

s/Jared C. Williams
 Jared C. Williams
 S.C. Bar No. 100806
 P.O. Box 403
 Mount Pleasant, SC 29465
 (843) 991-6528 – Office
 (803) 429-3393 – Mobile
jared@williamslawsc.com
Attorney for the Plaintiff

April 10, 2023
 Charleston, South Carolina

¹ Plaintiff has filed a separate Motion for Summary Judgment on the issue of liability that is also before the Court.

EXHIBIT A

ACKNOWLEDGEMENT OF SERVICE ON ONYX INSURANCE COMPANY



South Carolina Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

HENRY McMASTER
Governor

RAYMOND G. FARMER
Director

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105

August 17, 2021

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
ONYX INSURANCE COMPANY, INC., A RISK RETENTION GROUP
575 S. Saliman Road
Carson City, NV 89701-0000

Dear Sir:

On August 17, 2021, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-87-80(C). By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 38-77-160. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to sdubois@doi.sc.gov. When replying, please refer to File Number 185194, Viktar Kleuchenia v. Brian McCleod, 2021-CP-26-04596.

By:

Gwendolyn L. Fuller
General Counsel
(803)737-6732

Sincerely Yours,

Raymond G. Farmer
Director
State of South Carolina
Department of Insurance

Attachment

CC: Jared C. Williams
Post Office Box 403
Mount Pleasant, SC 29465

ELECTRONICALLY FILED - 2023 APR 19 13:48 AM - HONORARY - COMMON PLEAS - CASE#2021CP2604596

EXHIBIT B

ACKNOWLEDGEMENT OF SERVICE ON TEXAS INSURANCE COMPANY



South Carolina Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

HENRY McMASTER
Governor

MICHAEL WISE
Acting Director

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105

September 27, 2022

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Texas Insurance Company
700 North Pearl, 25th Floor
25th Floor
Dallas, TX 75201

Dear Sir:

On September 27, 2022, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-45-170. By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 38-77-160. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. The claimant, within this service letter, provided the following additional information regarding this first party claim: POLICY/CLAIM NUMBER OIC-SC-0001119-02. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to spurvis@doi.sc.gov. When replying, please refer to File Number 190666, Viktar Kleuchenia v. Brian Mcleod, 2021-CP-26-04596.

By:

Gwendolyn McGriff
General Counsel
(803)737-6732

Sincerely Yours,

Michael Wise
Acting Director
State of South Carolina
Department of Insurance

Attachment

CC: Jared C. Williams
Post Office Box 403
Mount Pleasant, SC 29465

FILED ELECTRONICALLY FILED -- 2022 SEP 27 10:12:33 AM -- HICORRY -- COMMONWEALTHS -- CASE# 2021CP2604596

EXHIBIT C

DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS
FOR ADMISSIONS

THOMPSON
& HENRY, P.A.
ATTORNEYS AT LAW

1300 SECOND AVENUE, THIRD FLOOR
POST OFFICE BOX 1740
CONWAY, SOUTH CAROLINA 29528

G. MICHAEL SMITH
MSMITH@THOMPSONLAW.COM

TELEPHONE
(843) 248-5741
FACSIMILE
(843) 248-5112

March 28, 2022

Jared C. Williams, Esq.
Law Offices of Jared C. Williams, LLC
P.O. Box 403
Mt. Pleasant, SC 29465

RE: Viktar Kleuchenia v. Brian McLeod
Civil Action No.: 2021-CP-26-04596
Date of Loss: 7/17/2018
Claim No.: 0381848190101049
Our File No.: 14364.84

Dear Mr. Williams:

I am enclosing the Defendant's Responses to Plaintiff's First Set of Requests for Admissions in connection with the above captioned matter with proper proof of service.

Very truly yours,

Mike

G. Michael Smith

GMS/kwn
cc: Brian McLeod
Mona Amos

ELECTRONICALLY FILED - 2023 Apr 10 11:08 AM - Horry - COMMON PLEAS - CASE#2021CP2604596

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO.: 2021-CP-26-04596
Viktar Kleuchenia,	)	
	)	
Plaintiff,	)	DEFENDANT'S RESPONSES TO
	)	PLAINTIFF'S FIRST SET OF
vs.	)	REQUESTS FOR ADMISSIONS
	)	
Brian McLeod,	)	
	)	
Defendant.	)	
	)	

TO: PLAINTIFF AND JARED C. WILLIAMS, ESQ., ATTORNEY FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant, responding to the Plaintiff's First Set of Requests for Admissions, would state as follows, pursuant to Rule 36, *South Carolina Rules of Civil Procedure*:

1. Please admit that Defendant failed to keep a proper look out while operating his motor vehicle at the time of the collision.

RESPONSE: Admit

2. Please admit that Defendant failed to yield to the right-of-way of Plaintiff's vehicle at the time of the collision.

RESPONSE: Admit

3. Please admit that Defendant was negligent in operating his motor vehicle in one or more ways at the time of the collision.

RESPONSE: Admit

4. Please admit that Defendant's negligence proximately caused the collision.

RESPONSE: Admit

5. Please admit that Defendant is at fault and, therefore, liable for the collision.

RESPONSE: Admit

6. Please admit that Plaintiff is not at fault and, therefore, is not liable for the collision.

RESPONSE: Admit

7. Please admit that there is no third-party person or entity that is liable for the collision.

RESPONSE: Admit

8. Please admit that Defendant is solely liable for the collision.

RESPONSE: Admit

9. Please admit that Plaintiff suffered injuries as a direct result of the collision.

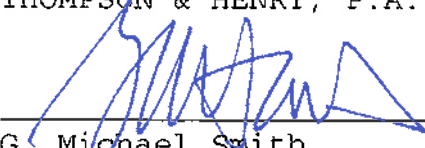
RESPONSE: Admit

10. Please admit that Plaintiff suffered injuries proximately caused by the collision.

RESPONSE: Admit

(signature on following page)

THOMPSON & HENRY, P.A.



G. Michael Smith
SC Bar No. 5255
1300 Second Ave., 3rd Floor
Post Office Box 1740
Conway, SC 29528
Phone: (843) 248-5741
Fax: (834) 248-5112
msmith@thompsonlaw.com

ATTORNEYS FOR THE DEFENDANT

Conway, South Carolina

March 28, 2022

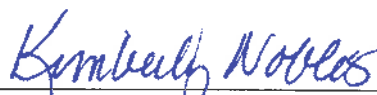
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A NO.: 2021-CP-26-04596
Viktar Kleuchenia,	)	
	)	
Plaintiff,	)	
	)	CERTIFICATE OF SERVICE
vs.	)	
	)	
Brian McLeod,	)	
	)	
Defendant.	)	
_____	)	

I, Kimberly Nobles, an employee for Thompson & Henry, P.A., attorneys for the Defendant in the above-captioned action and/or actions, certify that I have this 28 day of March, 2022, mailed a copy and/or copies of the following:

1. Defendant's Responses to Plaintiff's First Set of Requests for Admissions

to the undersigned at his/her address(es) of record, with sufficient postage attached thereto, as follows:

Jared C. Williams, Esq.
Law Offices of Jared C. Williams, LLC
P.O. Box 403
Mt. Pleasant, SC 29465



Kimberly Nobles

Conway, South Carolina



Jared C. Williams, Esq.
Licensed in SC
jared@williamslawsc.com

April 1, 2024

Via First-class Mail

Texas Insurance Company
10805 Old Mill Road
Omaha, NE 68154

**RE: Viktor Kleuchenia v. Brian McLeod
Civil Action No.: 2022-CP-26-04596**

To Whom it May Concern:

The above-referenced case is scheduled to be heard on April 9, 2024, starting at 9:00 a.m. with Bobby Buffington, Esq., serving as special referee. Should you have any questions or concerns, please feel free to contact me at (843) 991-6528, or by e-mail at jared@williamslawsc.com.

Sincerely,

Law Office of Jared C. Williams, LLC

A handwritten signature in blue ink, appearing to be 'Jared C. Williams'.

Jared C. Williams

Deposition of:

**Viktar Kleuchenia
v.
Brian McLeod**

Case #: 2022-CP-26-04596

April 9, 2024



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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF Horry) FIFTEENTH JUDICIAL CIRCUIT

Viktar Kleuchenia,)
Plaintiff(s),) Case No.:
vs.) 2022-CP-26-04596
Brian McLeod,)
Defendant(s).)

PRESIDING JUDGE: Bobby Buffington, Esquire
Special Referee

HEARING DATE: April 9, 2024

SCHEDULED TIME: 9:00 a.m.

LOCATION: Remote via Zoom

REPORTED BY: HEATHER R. LANDRY, CVR
Certified Verbatim Reporter

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1 A P P E A R A N C E S

2

FOR THE COURT:

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FOR THE DEFENDANT(S):

14 *No appearances

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1 (The proceedings commenced at 9:01 a.m.)

2 MR. BUFFINGTON: We're here today for a
3 damages hearing in the case of Viktor Kleuchenia versus
4 Brian McLeod, civil action number 2022-CP-26-04596.

5 And as I understand it, we are here today as a result
6 of the UIM carrier failing to appear in the case. It's
7 my understanding the liability carrier has settled on,
8 I guess, a covenant not to execute. And also, Jared,
9 you've gotten summary judgment in favor of
10 Mr. Kleuchenia on liability?

11 MR. WILLIAMS: Correct.

12 MR. BUFFINGTON: So we're here today to
13 have a hearing on damages. I received your pretrial
14 brief and I've reviewed that. And I'm in agreement
15 with your proposal of how to proceed including allowing
16 you to obtain the transcript, if you like, and submit a
17 proposed order. So with that, is there anything,
18 Jared, before we get started that we need to address
19 before we get into the testimony.

20 MR. WILLIAMS: I don't think so. I
21 think we're good to go.

22 MR. BUFFINGTON: All right. This
23 hearing will be conducted pursuant to the Rules of
24 Civil Procedure. And if I understand -- we're you
25 gonna put that as an exhibit, the notice that you gave

1 to the UIM carrier?

2 MR. WILLIAMS: I filed it with the
3 Court.

4 MR. BUFFINGTON: I saw it was filed with
5 the Court. And I may look that up and make reference
6 to it at some point.

7 MR. WILLIAMS: Okay.

8 MR. BUFFINGTON: But, of course, this is
9 a damages hearing. So we'll proceed. No one else has
10 appeared for today despite the notices they've been
11 given. So with that, Jared, I'm gonna recognize you
12 for an opening statement at then you can proceed with
13 your testimony.

14 I will say, Jared, that if at any time
15 during the day you need to meet, I can create a
16 separate Zoom room and put you in there with any
17 witness that you need to talk to before they go on the
18 stand or for any other -- if we need to take a break
19 for any reason, just let me that.

20 MR. WILLIAMS: Okay. Good.

21 MR. BUFFINGTON: All right. So with
22 that, I'm gonna turn it over to you. Thank you.

23 MR. WILLIAMS: Thank you. I guess,
24 first and foremost, Mr. Buffington, thank you for
25 agreeing to hear this case. Ms. Landry, thank you as

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1 well.

2 I'm gonna do my best to try to be brief
3 here today and run through, you know, the evidence
4 needed fairly quickly. As you mentioned,
5 Mr. Buffington, I have submitted a pretrial brief kinda
6 outlining the issues, at least from a damages
7 standpoint. And so I'm gonna try to rely heavily on
8 that brief and not be redundant here. I have a
9 tendency to kinda oversimplify things sometimes. So,
10 you know, my concern is hopefully that my attempt of
11 brevity in oversimplifying these issues in no way is,
12 you know, misconstrued to lessen the importance of this
13 case. This is a very significant case, very important
14 case for Mr. Kleuchenia. It's been six years in the
15 making that he's been waiting on this day. So, you
16 know, we have various significant damages and we're
17 requesting a very significant sum of money. I don't
18 deny that.

19 Let me start by telling you a little bit
20 about Mr. Kleuchenia, if I can. He's a very
21 interesting guy, very nice guy. And I've gotten to
22 know him pretty well. He's 43 years old at this point.
23 At the time of the wreck, he was 37 years old. He's
24 originally from Belarus. You'll notice that -- you've
25 heard him speak already. You can hear his accent. He

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1 came over here in the United States around 2003 when he
2 was 21 or 22 years old. Spoke a little bit of English
3 when he got here but, by and large, has learned to
4 speak English once he got here. And he does speak
5 English very well. Every once in a while there's a
6 word here and there that I may say that he doesn't
7 recognize. But he does a pretty good job of telling me
8 about that. But other than that, he speaks English
9 very well.

10 He was previously married. He's
11 divorced. He was divorced prior to the accident. And
12 he doesn't have any family here in the States. Both of
13 his parents are still alive and in good health, but
14 they live overseas. And prior to the wreck, he would
15 often go back and visit them, and he hasn't been back
16 to see them since this wreck.

17 The accident itself, as you mentioned,
18 you know, the liability portion of this claim has been
19 resolved. So I will say the specific details of the
20 accident really aren't relevant on the issue of
21 liability at least. However, I think they're important
22 just to get understanding of what's going on and also
23 to represent, you know, the severity of the wreck
24 itself. So what you'll hear Mr. Kleuchenia testify to
25 is that on July 17, 2018, he was leaving his house and

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1 he was heading to Walmart. He was traveling north on
2 Highway 17. And Mr. McLeod was pulling out of Avenue
3 52 to go south on Highway 17. So Mr. McLeod had to
4 cross over two lanes of traffic and then head in the
5 opposite direction that Mr. Kleuchenia was traveling.
6 To Mr. McLeod's credit, in his deposition he was
7 forthcoming. He acknowledged that his view was
8 obstructed when he was sitting at the stop sign, and so
9 he couldn't really see and essentially had to guess to
10 make sure traffic was clear. And, unfortunately, in
11 this case, Mr. McLeod guessed wrong.

12 You know, we're not seeking any kind of
13 punitive damages in this case. It's just a natural
14 damages case. But again, you know, the severity,
15 you'll see some photographs of the property damage that
16 I'll admit into evidence. And what you'll see is
17 that Mr. Kleuchenia was traveling about 45 miles per
18 hour at impact. So very significant impact, very
19 significant property damage in this case.

20 As far as his injuries and medical
21 treatment go, he's had a substantial amount of medical
22 treatment. He's got multiple injuries to several
23 different body parts. Again, I have briefed the
24 medical records submitted to you, Mr. Buffington. By
25 and large, from a medical standpoint in this case, I'm

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1 gonna let the medical records basically speak for
2 themselves. The records are what the records are. I
3 don't think it's feasible or practical or, quite
4 honestly, necessary for me to call four or five
5 physicians in here to talk about each separate body
6 part when we have the medical records and we can rely
7 on those records.

8 We will hear from Dr. Joye who's a pain
9 management physician who has evaluated Mr. Kleuchenia.
10 So he'll address a lot of the medical stuff in his
11 testimony today and also the life care plan that he's
12 prepared. With that said, I will give a brief of what
13 I would consider a Cliff Notes version of his injuries
14 and the medical treatment. So the vast majority of his
15 treatment has taken place at OrthoSC. Primarily, he's
16 treated with Dr. Cosby for his left foot injury;
17 Dr. Evans for his right knee; Dr. Parker who's a pain
18 management physician at OrthoSC for his lower back; and
19 he's been evaluated and seen several times by Dr. Cook
20 at OrthoSC, who's an orthopedic surgeon, for his lower
21 back. He underwent surgery with Dr. Rimkus for his
22 hernia and then he's had additional evaluations with
23 Dr. Nahigian for his right knee by Carolina Shoulder
24 and Knee Specialists. And he's also been evaluated by
25 Dr. Poletti at Southeastern Spine for his lower back

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1 injury.

2 In regards to his left foot, what you
3 will see in the medical records is that he had an X-ray
4 pretty early on in September of 2018, which is a couple
5 of months after the accident. And it noted a suspected
6 possible fracture of the first MTP joint. He received
7 an initial injection and did some physical therapy.
8 And then over time that has developed into severe gout
9 into that joint. It's also spread into his ankle.
10 He's been diagnosed with bursitis in the ankle and
11 os trigonum syndrome. And what you'll see is that
12 August of 2021, Dr. Crosby recommended going in and
13 doing a total joint replacement of that big toe. What
14 you'll also see -- it's noted in the medical records
15 and you'll hear from Mr. Kleuchenia in his testimony
16 today -- is that the time that the surgery was
17 recommended, he's also treating with other doctors.
18 And one of those doctors is Dr. Evans.

19 And so Mr. Kleuchenia had a conversation
20 with Dr. Evans about the recommendation for that
21 surgery, and what Dr. Evans relayed to him was that
22 based on his age -- he was 41 years old at this
23 point -- and the life expectancy of a joint
24 replacement, that if he proceeded with that surgery
25 now, he's likely to outlive that joint replacement and

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1 need another one. So the idea is that he's holding off
2 on that surgery to give him a better likelihood that he
3 won't outlive that replacement once it happens.

4 As far as his right knee goes, he had a
5 very complicated injury to the right knee. Initial
6 X-rays at Grand Strand Regional noted internal
7 derangement of the right knee. Within a couple of
8 months he had an MRI on the right knee and was
9 diagnosed with a partial ACL and meniscus tear. He was
10 noted to have a tibial spinal avulsion fracture in that
11 knee. And then there's also patellofemoral
12 chondromalacia. Basically cartilage defective issues
13 going on with that knee. Had an initial cortisone
14 injection to the knee with some physical therapy that
15 wasn't helpful.

16 And then Dr. Evans in December of 2019
17 went in and did an initial surgery on the right knee to
18 address the cartilage damage. Mr. Kleuchenia did some
19 additional post-op physical therapy at that point but
20 was continuing to have problems. So Dr. Evans did a
21 second surgery in May of 2022 to go in and address the
22 avulsion fracture. And basically what he did, in
23 layman's terms, was reconnect the ACL to the tibia bone
24 using a suture method. After the second surgery, more
25 physical therapy was done. Initially, Mr. Kleuchenia

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1 had some improvement with that right knee. But at this
2 point, you know, that was three or four years ago, he's
3 continued to decline since that time. And he's been
4 further evaluated by Dr. Nahigian who recommended going
5 in and doing a repeat chondroplasty procedure to help
6 clean up some of the cartilage damage in that knee.
7 And, again, you'll hear Dr. Joye testify to the future
8 medical that's been recommended in his life care plan.

9 In regards to his lower back, this is
10 the most significant issue he's got, it's the most
11 serious injury he's got. He had an MRI done in January
12 of 2019. And, in layman's terms, basically what's
13 going on with his lower back is he's got two levels of
14 herniation at the L4-L5 and at the L5-S1. At both
15 levels, he's got annular tearing, which is basically
16 the outer layer of that disc has been ruptured or torn.
17 And then the MRI notes that the L4-L5 that that disc is
18 pushing on the nerve root. As you know, Mr. Buffington,
19 once you start messing with that nerve root, you know,
20 you're in a whole another ballpark with these issues,
21 so.

22 As far as the medical he's received,
23 it's been a substantial amount of physical therapy. He
24 was initially recommended a series of three lumbar
25 epidural steroid injections, ended up only receiving

1 two of those injections because they just weren't
2 providing any relief. After that, he had an updated
3 MRI confirming the same issues. And then a series of
4 three lumbar facet injections were recommended; but,
5 again, he only had two of those injections because they
6 just weren't providing any relief. We've got opinions
7 from Dr. Cook and Dr. Poletti both saying that based on
8 his age, he needs to try to maintain his issue as long
9 as he can with conservative treatment. And Dr. Joye is
10 gonna outline that treatment in his life care plan.
11 Both Dr. Cook and Dr. Poletti basically said that at
12 some point he's gonna require a two-level fusion for
13 his back. And, again, that will be addressed in the
14 life care plan from Dr. Joye.

15 Beyond that, you'll also see in the
16 records, Mr. Buffington, that he's had an umbilical
17 hernia surgery. The initial medical records from Grand
18 Strand noted that he presented to the hospital the day
19 the accident with abdominal pain. Within a couple
20 months after the accident, he eventually had a CT scan
21 done on that abdomen that confirmed the umbilical
22 hernia. But, unfortunately, due to all these other
23 issues he had going on, that issue went largely
24 unaddressed for a few years until December of 2021 when
25 he followed up with Dr. Rimkus. At that point, he had

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1 an updated CT done. And Dr. Rimkus, upon review of the
2 CT, basically said that, you know, this is an urgent
3 issue at this point that needs to be addressed fairly
4 quickly. So within a month Dr. Rimkus performed a
5 hernia repair procedure and installation of a mesh.

6 Beyond that, Mr. Buffington, there's
7 some mentions throughout the medical records early on
8 from Access Medical of a kidney issue going on, some
9 suspected movement of his kidneys. He's treated on
10 several occasions at Atlantic Urology basically from
11 some incontinence issues, and those have been related
12 to his lower back. But what I will say is Dr. Ferraro
13 recently has confirmed upon review of a former IVP
14 procedure he had that his kidneys are shifting and he's
15 gonna need medical treatment for that. We're not
16 including any of that medical treatment in this claim.
17 It's not part of his life care plan. I'm just
18 mentioning it because if you review the medical records
19 it's gonna be noted in those records.

20 Again, as far as the future medical
21 goes, Dr. Joye has both evaluated Mr. Kleuchenia and
22 done a life care plan. A lot of his treatment set
23 forth in the life care plan is based on the opinions of
24 Dr. Crosby, Dr. Evans, Dr. Cook, Dr. Nahigian, and
25 Dr. Poletti, along with his own evaluation as a pain

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1 management physician. So you will hear him testify in
2 detail about the future medical recommendations.
3 You're also gonna hear from Mr. Kleuchenia today.
4 He'll testify about his injuries. He's gonna tell you
5 about the issues he's having and the impact these
6 issues have had on his life both before and how he is
7 now after the accident. We'll go into detail in his
8 testimony. But what I want tell you, Mr. Buffington,
9 is that, by and large, Mr. Kleuchenia spends most of
10 his day in bed. It's noted on several occasions
11 between the medical records. It will be noted -- he'll
12 testify to it in his testimony. It's also noted in
13 Dr. Joye's evaluation that, you know, if he's upright
14 for about 10 or 15 minutes on his feet, he starts
15 having pain. He gets about an hour, hour and a half,
16 you know, before he's got to lay down with some relief
17 because of his back pain. So, by and large, he spends
18 most of the day in the house, in the bed, or in the
19 recliner.

20 You're also going to hear testimony from
21 Cynthia Grimley who is a vocational evaluator. And
22 she's gonna testify about Mr. Kleuchenia's work
23 history. And, basically, she's gonna opine that based
24 on his employment experience, his issues, his
25 abilities, that he suffered a 100 percent loss of

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1 employment in a competitive labor market. You'll hear
2 Mr. Kleuchenia testify about his work history, that
3 he's been a cabdriver since 2005. He's owned his own
4 cab company since 2007 called Imperial Cab. And you'll
5 also hear that just a few months before this accident
6 that Mr. Kleuchenia had purchased a flatbed truck and
7 he had started hauling freight for a friend of his,
8 Alex Yanushsko, who owns a large shipping company up
9 North. And so in April and May of 2018 Mr. Kleuchenia
10 went up North and was hauling freight on a part-time
11 basis. And he and Mr. Yanushsko had an agreement that
12 Mr. Kleuchenia was gonna return to Myrtle Beach for the
13 summer of 2018, close down his cab company, and then
14 Mr. Kleuchenia is gonna make plans to move up North
15 permanently and work for Mr. Yanushsko.

16 You'll hear testimony about the wages he
17 was gonna be expected to earn doing that job both
18 through Ms. Grimley. And then, ultimately, you're
19 gonna hear -- the last witness today will be
20 Dr. Oliver Wood. I'm sure you're familiar with
21 Dr. Wood. He's been around forever. He's gonna
22 testify about the economic damages to present value.
23 So Dr. Wood is gonna testify about the value of the
24 life care plan set forth by Dr. Joye. And, ultimately,
25 he'll testify that the cost of future medical in

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1 present value \$799,101. You'll also hear Dr. Wood
2 testify about Mr. Kleuchenia's total loss of earnings
3 based on Ms. Grimley's vocational report, both pretrial
4 and posttrial. And what you'll hear is the total
5 financial loss in present value is \$2,635,614. And
6 then, lastly, you'll hear Dr. Wood testify about the
7 loss of personal services based on Mr. Kleuchenia's own
8 testimony. And Dr. Wood is gonna testify that the loss
9 of personal services to present value is \$131,544.

10 Again, as I mentioned, I briefed the
11 damages fairly significantly sort of outlining those
12 issues. Part of the reason I did that was, you know,
13 to educate you beforehand on the damages. But the
14 other reason I did that, Mr. Buffington, is because I
15 want to be upfront about the amount of damages we're
16 seeking here. It is a significant amount of damages
17 that we're asking. I don't deny that, and I want to
18 get out in front of that. But what my goal here today
19 is, hopefully, that I can present the evidence to
20 justify those damages and justify that number. My hope
21 is that we won't just look at the number itself and
22 make a predetermined decision before hearing the
23 evidence and just allow me to present the evidence to
24 justify that number. And my hope is by the end of the
25 day the testimony supports what we're requesting.

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1 So with that, I think that pretty much
2 outlines the damages and the issues here. Unless
3 there's any housekeeping matters we need to take up
4 beforehand, the first witness I plan to call is
5 Viktor Kleuchenia.

6 MR. BUFFINGTON: All right. Yeah, thank
7 you for that. The only thing I forgot to mention is
8 that I would like to probably take a break about every
9 hour for ten minutes or so. But for now, yes, we can
10 go ahead and call your first witness. And, Heather, if
11 you could swear him in, that would be great.

12 (Whereupon, the witness, VIKTAR
13 KLEUCHENIA, was duly sworn.)

14 - - - - -

15 DIRECT EXAMINATION

16 BY MR. WILLIAMS:

17 Q. Viktar, can you state your full name for us.

18 A. Viktar Kleuchenia.

19 Q. And how old are you, Mr. Kleuchenia?

20 A. Forty-three years old.

21 Q. What's your date of birth?

22 A. February 27, '81.

23 Q. Can you tell us what your current address is?

24 A. 61736 Avenue North, Apartment G,

25 Myrtle Beach, South Carolina.

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1 Q. And how long have you lived in the
2 Myrtle Beach area?

3 A. Since 2003.

4 Q. Okay.

5 A. May I ask a question? Can I ask a question?

6 Q. Sure.

7 MR. BUFFINGTON: Yes, sir.

8 THE WITNESS: Yeah. Can I turn off
9 video and come back to the bed and continue from this
10 bed if I start feeling not right? I'm sitting. It's
11 already been 20 minutes. I can't stop having pain in
12 the back. It's okay if I turn off the video and come
13 back to the bed?

14 MR. WILLIAMS: Mr. Buffington, how do
15 you want to handle that?

16 MR. BUFFINGTON: I'm sorry. You want to
17 turn off the video and do what? I didn't hear that.

18 THE WITNESS: I start having lower back
19 pain. Is it okay if I turn off the video and come back
20 to the bed and we'll continue with just sound only. Is
21 this okay?

22 MR. BUFFINGTON: Yes, sir. Yeah, I
23 don't have a problem with that. Yes, sir. If we need
24 you to turn the camera back on, we'll give you some
25 notice and we'll do that. But, yes, sir, that's fine.

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1 (Brief pause.)

2 BY MR. WILLIAMS:

3 Q. Tell us where you're originally from.

4 A. I'm from Belarus.

5 Q. Okay. And so how old were you when you came
6 over to the States?

7 A. It was in 2003. So I was 22.

8 Q. Okay. And what made you come over here?

9 A. I just came because the program for the
10 students, exchange programs, a lot of people was coming
11 using this program. And I decided to come over as well
12 to improve my English, to see what's going on, and be
13 in a different country.

14 Q. On that note, tell us how far you've gone in
15 school?

16 A. I completed four years.

17 Q. And was your education in Belarus or the
18 States?

19 A. In Belarus.

20 Q. Did you graduate? I mean, did you receive
21 any kind of diploma or anything?

22 A. No. It should be one year more for that.

23 Q. And the education you received, is that
24 basically the equivalent to a high school over here in
25 the United States?

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1 A. I think so. I'm pretty sure it is. I didn't
2 dig into it much.

3 Q. And, obviously, you speak English. Did you
4 speak English before you came over here to the
5 United States?

6 A. Until we come here, we all thinking that we
7 do speak English. But after we come here, we
8 understand that we don't.

9 Q. Okay. So you learned a little bit better
10 English once you got over here. Is that fair to say?

11 A. Yes.

12 Q. And are you currently here in the
13 United States on a green card? Is that right?

14 A. Yes.

15 Q. It's my understanding that you're working on
16 your citizenship to be done this year?

17 A. Yes. It took me -- it should be done long
18 time ago. But because of this accident and all this
19 treatment -- I was eligible to get citizenship in 2018
20 already.

21 Q. Okay. Do you have any family here in the
22 United States?

23 A. No.

24 Q. Do you still have family back in Belarus?

25 A. Yes. Parents.

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1 Q. Okay. Both of your parents?

2 A. Yeah, both of my parents.

3 Q. Are they both still in fairly good health for
4 their age and everything?

5 A. They're 70 years old. For their age, they're
6 okay.

7 Q. Are you currently married?

8 A. No.

9 Q. Where you previously married before?

10 A. Yes.

11 Q. What year did you get divorced?

12 A. 2015.

13 Q. Do you have any children?

14 A. No.

15 Q. Can you tell us, before this accident
16 happened in July of 2018, what kind of health were you
17 in? Did you have any significant injuries or medical
18 issues prior to the wreck?

19 A. No.

20 Q. Prior to the wreck, had you ever had any
21 medical treatment or injuries on your left foot?

22 A. No.

23 Q. Had you ever had any prior injuries or
24 medical treatment on your right knee?

25 A. No.

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1 Q. Have you ever had any prior medical treatment
2 or injuries to your lower back?

3 A. No.

4 Q. Before the wreck, can you tell us what kind
5 of activities you like to do? What did you do for fun
6 before the wreck?

7 A. I like to do bicycling. I can do, like,
8 30 miles in one shot in the forest.

9 Q. Yeah. You were telling me you would go to a
10 certain location somewhere to bike before this
11 accident. Do you know where that was?

12 A. Yes. It's between -- it's a small road
13 between Georgetown and Conway. I'm not sure of the
14 number. I believe 707. In the rural area up there
15 where the forest and all that stuff. I mean, in the
16 middle of nowhere. It's hard to explain.

17 Q. Okay. Before this wreck happened, would you
18 consider yourself to be a social person? Did you go
19 out to eat with friends, go to cookouts, and stuff like
20 that?

21 A. Yes, of course.

22 Q. It's my understanding you also enjoyed
23 working on cars before the accident?

24 A. Yes.

25 Q. And then did you do some gardening before the

Page 24

1 accident as well that you enjoyed?

2 A. A little bit. But now I'm not doing it at
3 all. But before, yeah. Like, one was selling
4 tomatoes. I can't use them. I was always buying them
5 and putting them in the backyard.

6 Q. Do you remember the date of the collision
7 itself?

8 A. Yes.

9 Q. What's the date off the top of your head?

10 A. 17 of July 2018.

11 Q. Okay. So at the time of the wreck, you were
12 37 years old. Is that right?

13 A. Yes.

14 Q. What were you doing for work at this time in
15 July of 2018?

16 A. I was driving a taxicab. Last summer of my
17 driving a taxicab.

18 Q. Did you own your own cab company?

19 A. Yes.

20 Q. And what was the name of that company?

21 A. Imperial Cab.

22 Q. How long have you been a cabdriver?

23 A. Since 2005.

24 Q. And how long have you owned that company
25 yourself?

1 A. Since 2007.

2 Q. Okay. So you worked for another cab company
3 for about two years; and then after that, you had your
4 own cab company since 2005?

5 A. Yes.

6 Q. Between 2003 when you initially came over to
7 the States and 2005 when you started working as a
8 cabdriver, what other kind of jobs did you have?

9 A. I was working at a gas station as a cashier.

10 Q. And what did you do as a cashier?

11 A. Running a cash register. Do cleaning,
12 stocking.

13 Q. Okay.

14 A. It's like -- a gas station cashier do
15 everything.

16 Q. Okay. So part of your job as a cashier you
17 have to stock items and everything?

18 A. Yes. Yes.

19 Q. Did you own the vehicle that you used for
20 your cab company?

21 A. Yes.

22 Q. Can you tell us what kind of vehicle that
23 was?

24 A. Chevrolet Astro van, 2000 year.

25 Q. Did you put a lot of money into that vehicle?

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1 A. Yeah. I loved it. I put all kind of
2 aftermarket stuff.

3 Q. Can you tell us what your job duties were as
4 a cabdriver? What did you do on a daily basis?

5 A. I was responding to phone calls because I had
6 some clients, regulars. And as soon as they're calling
7 me, I was going to get them.

8 Q. Okay.

9 A. Especially for that reason, I found an
10 apartment which is kind of in the middle of the city.
11 So I'll be ten minutes away from any place in the city.

12 Q. As part of your job duties as a cabdriver,
13 did you also help people load luggage and stuff like
14 that?

15 A. Of course. That's part of it, yeah.

16 Q. Did you enjoy being a cabdriver?

17 A. Yes. Because I like to meet people and talk
18 to people and all that stuff.

19 Q. And it's my understanding in the early part
20 of 2018, you started doing some other work hauling
21 freight. Is that right?

22 A. Yes. Because after Uber came in, the cab
23 company stopped bringing enough money for me to make my
24 living. And my friend told me that there's money in
25 the hauling business and he told me to give it a try.

1 Q. Okay.

2 A. I came over, looked it up. I liked it.
3 There's lots of money in there. And I say okay, I need
4 to go back to Myrtle Beach, finish up my cab company,
5 close it properly. Shut down everything and move to
6 you.

7 Q. And the friend you're referring to, is that
8 Alex Yanushko?

9 A. Yes.

10 Q. And the name of the company that he owns, is
11 that AC Shipping, LLC?

12 A. Yes.

13 Q. And is that based out of New Jersey?

14 A. Yes. Newark, New Jersey.

15 Q. How long -- before the summer of 2018, how
16 long were you up North hauling freight with Alex?

17 A. Excuse me? Before accident you're talking
18 about?

19 Q. Yes, sir.

20 A. April, May.

21 Q. Of 2018?

22 A. Yes.

23 Q. Okay. In April and May of 2018, were you
24 doing that work full time or just part time?

25 A. Full time.

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1 Q. And it's my understanding you actually
2 purchased your own truck to start doing this work. Is
3 that right?

4 A. Yes. Yes.

5 Q. Hold on one second, Mr. Kleuchenia. Let's
6 see if I can share my screen.

7 A. Yes. That's my truck.

8 Q. Can you see that?

9 A. Yes.

10 Q. You've seen this photograph before?

11 A. Yes.

12 Q. Okay. And you said that's your truck in this
13 photograph?

14 A. Yes.

15 MR. BUFFINGTON: It's off the
16 photograph.

17 THE WITNESS: The photograph is off,
18 yeah.

19 MR. WILLIAMS: Say again.

20 MR. BUFFINGTON: It looks like your
21 outline is on the screen right now.

22 (Brief pause.)

23 MR. WILLIAMS: Mr. Buffington, in the
24 exhibits I provided to you, this is marked as
25 Plaintiff's Exhibit No. 3.

1 (Plaintiff's Exhibit No. 3 was marked
2 for identification.)

3 BY MR. WILLIAMS:

4 Q. Viktar, you said this is a photograph of your
5 truck that you purchased to do this work?

6 A. Yes. Truck and trailer.

7 Q. Okay. Can you explain to us how you load
8 those vehicles?

9 A. You got to disconnect the trailer, leave it.
10 And then drive first car on the truck. Then you have
11 to mount the car with the straps to be safe. Then you
12 have to back up and connect trailer and drive a second
13 car in the trailer. It's actually pretty -- job, to
14 load and unload this stuff.

15 Q. And it looks like you strap down these
16 vehicles as well?

17 A. Yes, of course.

18 Q. Okay. So you --

19 A. They have to be strapped. Basically, on this
20 picture, for some reason, you can't really see where
21 they are strapped, but they are strapped.

22 Q. And in order to strap these vehicles down,
23 are you kind of crawling up on the bed of the truck and
24 kneeling down and stuff?

25 A. Yeah, of course. Of course, yeah.

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1 Absolutely. And you have to use a lot of power to do
2 it.

3 Q. It looks like this photograph is done at a
4 Volkswagen dealership. Where you picking up these
5 vehicles from a dealership?

6 A. Yes. They're brand-new.

7 Q. And is this the typical type of work you
8 would be doing with Alex?

9 A. Yes.

10 MR. WILLIAMS: Mr. Buffington, just to
11 make a clear record, I'm gonna move Exhibit No. 3 into
12 evidence.

13 MR. BUFFINGTON: Exhibit No. 3 is moved
14 into evidence.

15 (Plaintiff's Exhibit No. 3 was received
16 into evidence.)

17 Q. Mr. Kleuchenia, since you purchased your own
18 truck, I assume this is something you were planning to
19 do full time on a regular basis?

20 A. Yeah, of course. Because this job is good
21 and there is money there. And I got used to doing it.
22 I got experience. So I was ready to come over and do
23 it.

24 Q. Did you have an idea of how much money you
25 were expected to earn once you started doing this work

1 full time?

2 A. Yeah. Around 500 gross income. And after
3 gas and all that stuff, around 400 a day.

4 Q. So 500 gross. And then you said about a
5 hundred dollars a day in expenses, right?

6 A. Yes.

7 Q. Have you worked in any capacity since the
8 accident in July of 2018?

9 A. No.

10 Q. You haven't worked as a cabdriver since 2019?

11 A. No.

12 Q. You haven't worked hauling freight since
13 2018?

14 A. No.

15 Q. Have you had zero income since 2018?

16 A. Yes.

17 Q. And what is the reason you haven't worked
18 since 2018?

19 A. Because of my pain. I can't stand. Like
20 same as now, I start feeling bad, I need to lay down.

21 Q. We'll get into, you know, sort of the
22 physical limitations in a little more detail in just a
23 bit. But I want to ask you about the accident itself.
24 Do you remember approximately what time of day it was
25 when the accident happened?

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1 A. It's been a long time. It was around
2 afternoon, but I'm not sure the exact time.

3 Q. It was daytime. Is that correct?

4 A. Yeah. Definitely daytime, yes.

5 Q. Do you remember where you were coming from
6 and going to?

7 A. Yeah. I was going North Kings Highway on the
8 intersection of 52nd Avenue North when all this
9 happened.

10 Q. And to the best of your ability, could you
11 tell us how the accident happened.

12 A. I was driving and it was some kind of bushes
13 in the corner. And I wasn't even all the way to the
14 right lane. I was kind of -- it was a three-lane road
15 and I was in the middle lane, basically. And he came
16 so quick, I wasn't even able to move my leg to my brake
17 pedal. And I hit him, he turned around 360 degrees,
18 almost; maybe 270. And I went, like, a little bit more
19 and stopped on the other side.

20 Q. Do you have any idea how fast you were going
21 at the point of impact?

22 A. Around 45. Maybe 40.

23 Q. Can you see those photographs?

24 A. Yes.

25 Q. Okay. These have been marked as Plaintiff's

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1 Exhibit No. 1 and Exhibit No. 2. Do you recognize
2 these photographs, Mr. Kleuchenia?

3 A. Yeah. That's my cab. And on the left side a
4 little bit further down is a truck that hit me.

5 (Plaintiff's Exhibit No. 1 was marked
6 for identification.

7 (Plaintiff's Exhibit No. 2 was marked
8 for identification.)

9 Q. And the same with Exhibit No. 2, is that a
10 photograph of your cab?

11 A. Yes.

12 Q. Okay. And is this an accurate representation
13 of the condition of your vehicle after the accident?

14 A. Yes.

15 Q. Okay. And you mentioned the vehicle in
16 Exhibit No. 1, the pickup truck behind you, that's
17 Mr. McLeod's vehicle?

18 A. Yes.

19 Q. And then in Exhibit No. 2 it looks like the
20 fire department reported to the scene after the
21 accident. Is that correct?

22 A. Yes.

23 Q. Did the ambulance come as well?

24 A. Yes.

25 Q. So based on these photographs, it looks like

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1 the front -- almost like the front corner passenger of
2 your vehicle hit the driver's side of Mr. McLeod's
3 vehicle. Is that correct?

4 A. Yes.

5 MR. WILLIAMS: Mr. Buffington, again,
6 just to make a clear record, I gonna move Exhibits
7 No. 1 and No. 2 into evidence.

8 MR. BUFFINGTON: Exhibits No. 1 and
9 No. 2 are admitted into evidence.

10 (Plaintiff's Exhibit Nos. 1 and 2 were
11 received into evidence.)

12 BY MR. WILLIAMS:

13 Q. Do you remember immediately after the
14 accident happened sort of what your thoughts were,
15 Mr. Kleuchenia? Do you remember being in pain or
16 anything?

17 A. I was in shock. I kind of -- I remember came
18 out from vehicle because all the doors was blocked.
19 And I was thinking that the vehicle can start on fire
20 right now. And I tried to get out, but I was able to
21 get out from the back door.

22 Q. Okay. So you had to crawl to the back of the
23 vehicle to get out that way?

24 A. Yes.

25 Q. And as far as your medical treatment and your

1 injuries go, is it safe to say that you don't, at this
2 point, remember bit by bit what all medical treatment
3 you've received?

4 A. Explained this to me. I didn't --

5 Q. Sure. You don't remember every office visit
6 with each doctor or anything like at this point. Is
7 this accurate?

8 A. Yes. It's impossible.

9 Q. Okay. Let me just ask you generally: After
10 the accident, where did you initially seek treatment?

11 A. I went to the emergency room on the same day.
12 And I was -- because a whole bunch of pain came up.
13 After that, I went home. And I was referred to see the
14 regular doctor. But my pain was so, so bad, I had to
15 stay -- especially on the chest -- I was staying in the
16 bed two weeks; wasn't able to move or even hardly
17 breathing. Because even if I'm coughing, it was crazy
18 pain. But when I was able to get to the doctor, I went
19 up there and all my treatment started.

20 Q. Okay. And the hospital that you reported to
21 on the same day of the accident, is that Grand Strand
22 Regional?

23 A. Yes.

24 Q. Do you remember what kind of treatment or
25 what they did for you at the hospital? I know it's

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1 been a long time. But do you remember?

2 A. No. They did some imaging, but I don't
3 remember what kind.

4 Q. Okay. And then I wanted to ask you,
5 Mr. Kleuchenia, this came up in the deposition in this
6 case: Once you got discharged from the hospital the
7 same day of the accident, am I correct that you called
8 Mr. McLeod?

9 A. I believe I called him the next day. No, I
10 called him the next day because I thought his daughter
11 left the scene in the ambulance. So I called him the
12 next day to find out what's going on and all that
13 stuff.

14 Q. Okay. So you were just calling to check up
15 on him and his family. Is that right?

16 A. Yes. Yes. Yes.

17 Q. There was nothing, you know, angry or
18 anything about that conversation?

19 A. No. We just spoke about how he liked his
20 vacation here. He loved this. But he said but
21 basically -- basically, I called him to ask him about
22 his daughter.

23 Q. Okay. And then the next place that you
24 followed up for medical treatment, is that Access
25 Medical?

1 A. Yes.

2 Q. And ten it looks like you may have followed
3 up with Access Medical on a number of occasions. And
4 then eventually where you referred ever to OrthoSC?

5 A. Yes.

6 Q. And is OrthoSC where a majority of your
7 medical treatment has taken place?

8 A. Yes.

9 Q. What all body parts have you treated for at
10 OrthoSC? Can you tell us?

11 A. Left foot, right knee, and lower back.

12 Q. And is Dr. Crosby the primary doctor you've
13 seen for your left foot?

14 A. Yes.

15 Q. From a big picture standpoint, would you be
16 able to tell us what kind of medical treatment you've
17 had on your left foot?

18 A. Including bills?

19 Q. No. Let me try to walk you through it. Have
20 you had imaging done on that left side?

21 A. Yes.

22 Q. Have you had an injection to the left foot,
23 the toe, the actual toe?

24 A. Yes.

25 Q. Okay. It's my understanding you've done some

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1 physical therapy for the left foot. Is that right?

2 A. Yes.

3 Q. Okay. And then have you had an additional
4 injection into your ankle on the left foot?

5 A. Yes.

6 Q. And you're aware Dr. Crosby has recommended
7 surgery on that left foot, right?

8 A. Yes.

9 Q. You have not undergone the surgery at this
10 point. Is that accurate?

11 A. Absolutely, yes.

12 Q. Can you tell us the reason you haven't had
13 that surgery yet?

14 A. Because I spoke to Dr. Evans and he said I'm
15 kinda too young for that. And, basically, not all the
16 surgeries are successful. Basically, sometimes people
17 have problem after that. And I discussed the same
18 thing with physical therapist which I was working with
19 and asked her opinion. And she told me that this
20 surgery is a last stop, basically; if you can hold it
21 somehow, wait then. Because after the surgery, you can
22 be in worse condition and it's gonna be nobody's fault.

23 Q. Can you tell us what kind of issues you're
24 having with your left foot?

25 A. I'm having gout issues. And I'm not able to

1 wear proper shoes. As soon as I put any kind of shoes
2 except flip-flops, it's irritating my joint and it
3 hurts after that. So I have to wear flip-flops all the
4 time, unfortunately.

5 Q. Does your left foot hurt when you walk?

6 A. Not all the time. It starts when I do this
7 for some time. But for short walking, like around the
8 house or from house to the car, is not -- it's alright.
9 But still I have to wear flip-flops.

10 Q. How long would you say your foot starts
11 bothering after walking? How many minutes?

12 A. It's every time different. But sometimes 20,
13 sometimes 40. But I cannot say exactly.

14 Q. It's my understanding you do a lot of icing
15 on that left foot. Is that right?

16 A. Yeah. When it starts hurting, I put it in a
17 jar with extremely cold water.

18 Q. Does that help the pain?

19 A. Yes.

20 Q. How often would you say you're doing that,
21 the icing?

22 A. Every time I have gout flare first or after
23 prolonged walking, when I see that it starts hurting, I
24 do that. I have a jar sitting in my backyard. I just
25 put in some ice and I can do that.

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1 Q. Can you give us an idea of how often you're
2 doing that? Is that multiple times a day, once a day,
3 once a week? Best estimate, how often are you doing
4 that?

5 A. Definitely every day.

6 Q. Okay.

7 A. When it starts, like, I'm go in there every
8 hour when it does -- every day it needs it. That's why
9 I keep it full in the back, in the backyard.

10 Q. Okay. And are you also on medications for
11 gout?

12 A. Yes.

13 Q. Have you ever been diagnosed with any gout
14 issues or anything before this wreck?

15 A. No.

16 Q. And the joint replacement surgery that's been
17 recommended by Dr. Crosby, is that something that you
18 eventually plan to receive?

19 A. Yes.

20 Q. As far as your right knee goes, is the
21 primary doctor you've treated with for the right knee,
22 is that Dr. Evans?

23 A. Yes.

24 Q. Okay. I want to try to walk you through some
25 of the medical treatment on the right knee. Have you

1 done physical therapy for that right knee?

2 A. Yes. Multiple times.

3 Q. Okay. Have you had an injection on that
4 right knee?

5 A. Yes.

6 Q. And then how many surgeries have you had on
7 your right knee to date?

8 A. Two.

9 Q. Okay. And between -- or after the first
10 surgery and before the second surgery, did you do
11 additional physical therapy during that time frame?

12 A. Yes.

13 Q. And after the second surgery, did you do more
14 physical therapy?

15 A. Yes.

16 Q. Okay. And since the last surgery that was in
17 May of 2020, would you say your right knee has gotten
18 better, worse, or stayed about the same?

19 A. It's got a little bit better. It was
20 improving but then improvements stopped. And I'm still
21 having trouble going down stairs.

22 Q. Okay. Can you tell us how much pain your
23 knee gives you on a daily basis?

24 A. I'm trying to be the way I don't have pain.
25 But, basically, when I have gout, it pains. And if I'm

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1 on the leg too much, I start feeling discomfort and
2 then pain. But, basically, by staying in the bed, in
3 the chair, in a special chair, it's all right. But as
4 soon as I'm going upright, I have to watch it.

5 Q. Okay. How long would you say you can be up
6 and walking around before your knee starts bothering
7 you?

8 A. Around one hour, I say.

9 Q. Do you have any kind of clicking or popping
10 in that right knee?

11 A. Yes.

12 Q. And then you mentioned issues with stairs.
13 What kind of problems does stairs give you?

14 A. When you're going down stairs, it just kind
15 of -- I have to grab something with my hands to hold
16 myself.

17 Q. Do you take stairs one at a time, meaning you
18 put both feet on each stair?

19 A. When I'm going down stairs, yes.

20 Q. And then at this point, do you know what kind
21 of medical treatment has been recommended for your
22 right knee?

23 A. I'm sorry. I'm really sorry.

24 Q. Did you hear my question, Viktor?

25 A. No. Can you repeat it?

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1 Q. Yeah. At this point, has there been
2 additional medical treatment that's been recommended
3 for your right knee?

4 A. Only what Dr. Joye said.

5 Q. Okay. Do you remember seeing Dr. Nahigian in
6 Columbia?

7 A. Yes.

8 Q. Okay. Did he recommend any kind of medical
9 treatment that you're aware of?

10 A. He said that I need another surgery, to
11 repeat a surgery.

12 Q. And to the extent that that surgery would
13 help relieve some symptoms in your right knee, is that
14 something you'd be willing to undergo or would like to
15 undergo?

16 A. Of course. Everything that will improve, I
17 will do.

18 Q. Okay. And then for your lower back, is it
19 safe to say that your lower back is the most
20 significant issues you have?

21 A. Absolutely. Yes.

22 Q. It causes you the most problems. Is that
23 accurate?

24 A. Yes. Yes.

25 Q. And then most of the treatment you've

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1 received for your lower back was done at OrthoSC. Is
2 that correct?

3 A. Yes.

4 Q. Okay. Have you had physical therapy for your
5 lower back?

6 A. Yes.

7 Q. Okay. Have you had injections for your lower
8 back?

9 A. Yes.

10 Q. Do you remember how many injections you've
11 received?

12 A. First set, I received two or three. Two or
13 the three because after second injection didn't help,
14 the doctor said there's no reason to do another
15 injection. Because after the second set, it's supposed
16 to help. And he said he's not going to do it again.
17 And after that, I did another two injections. That's
18 how I remember it.

19 Q. Okay. Can you tell us how much pain you're
20 in on a daily basis due to your lower back?

21 A. I have to stay in the bed to not to have this
22 pain. Because as soon as I start standing and sitting,
23 it starts from discomfort then rising, rising, rising.
24 Then the pain becomes crazy. I have to lay down, like,
25 right away. And I had an issue because of this, like,

1 a few months ago.

2 Q. Okay. How long do you think you can be
3 upright and moving around before you need to lay back
4 down?

5 A. I'll say around 45 minutes. But sometimes
6 it's more, sometimes it's less. After 50 minutes, it
7 definitely starts giving bad feeling in me.

8 Q. And the only relief is laying flat. Is that
9 correct?

10 A. Yes.

11 Q. Okay. You mentioned that you had an issue a
12 couple months ago. Tell us what you're referring to
13 about that?

14 A. I went to my friend's service to drop off a
15 car. And I was kind of upright more than one hour.
16 And at a certain point, when I was already up there, my
17 pain became so bad that I started losing myself and I
18 started falling on the ground. And I hurt my finger
19 pretty bad. They didn't know what to do with me. And
20 they say we're gonna call the ambulance. I said don't
21 call ambulance, they're not gonna do anything. Just
22 let me lay down. They kinda helped me to get to the
23 couch in their office. I lay down there like half an
24 hour. And after that, I went home.

25 Q. Okay. And you're aware that doctors have

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1 told you you're eventually going to require surgery on
2 your back. Is that right?

3 A. Yes.

4 Q. Does that, you know, worry you or scare you
5 or anything knowing you're gonna need surgery on your
6 back at some point?

7 A. Yeah. Because I heard a lot of opinions that
8 after the surgery it could be worse.

9 Q. And then you've also had a hernia issue. Is
10 that correct?

11 A. Yes.

12 Q. Who did you treat with for your hernia? Do
13 you remember.

14 A. Dr. Rimkus.

15 Q. Okay. Have you had any problem with the
16 hernia since that surgery in January of 2020?

17 A. I had abdominal pain every once in a while,
18 but I cannot say it's to hernia. After Dr. Rimkus did
19 my check up, he said the hernia looks good.

20 Q. Okay. And then you've treated at Atlantic
21 Urology on a number of occasions. Is it fair to say
22 you're having some issues going to the bathroom?

23 A. Yes.

24 Q. At night, do you have problems going to the
25 bathroom in your bed?

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1 A. Unfortunately, yes.

2 Q. Okay. And it's also noted that you've had
3 some persistent diarrhea since the accident. Is that
4 correct?

5 A. Yes.

6 Q. To your knowledge, have you doctors related
7 that to your lower back injury?

8 A. Yes.

9 Q. Bear with me.

10 (Brief pause.)

11 Q. Can you see this document?

12 A. Yes.

13 Q. And this has been marked as Plaintiff's
14 Exhibit No. 4. Have you seen the actual physical bills
15 in this case, Mr. Kleuchenia?

16 A. Some of them, yes.

17 (Plaintiff's Exhibit No. 4 was marked
18 for identification.)

19 Q. We set down a couple weeks ago and I had a
20 notebook full of a bunch of papers and stuff. Is that
21 right?

22 A. Yes.

23 Q. And in that notebook there's basically copies
24 of a lot of the medical bills and stuff like that. Is
25 that true?

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1 A. Yes.

2 Q. Okay. And then you've seen this document.
3 We sat down and went through this document as well. Is
4 that correct?

5 A. Yes.

6 Q. And to the best of your knowledge, looking at
7 this document, is this a fair and accurate
8 representation of the medical bills you've incurred to
9 date?

10 A. Yes.

11 MR. WILLIAMS: Mr. Buffington, I'm gonna
12 go ahead and admit Exhibit No. 4, the summary of the
13 medical bills. And then what I've provided to you is a
14 copy of the actual bills and records. I'm gonna move
15 that into evidence, please.

16 MR. BUFFINGTON: Yes. Plaintiff's
17 Exhibit No. 4 is admitted into evidence.

18 (Plaintiff's Exhibit No. 4 was received
19 into evidence.)

20 BY MR. WILLIAMS:

21 Q. Mr. Kleuchenia, I asked you some stuff that
22 you enjoyed doing before the accident. One of the
23 things you mentioned was riding your bike. Have you
24 ridden your bicycle since the date of this accident?

25 A. No.

1 Q. Can you tell us what you do on a daily basis?
2 What does every day look like to you?

3 A. Before accident or now?

4 Q. Now.

5 A. I can't really do anything. I have to wake
6 up, reading books. Tired of watching movies.
7 Basically reading books. I try to stand up, do
8 something around the house. But that doesn't really
9 work good because I have to go back lay down. If I
10 don't, I cannot think. I don't know what to do, like,
11 all the stuff.

12 Q. Okay. So you spend most of your day in the
13 house. Is that fair to say?

14 A. Yes. Yes.

15 Q. Did you have pain bending over, like trying
16 to reach down to the floor?

17 A. Oh, yeah.

18 Q. Do you have pain when you try to pick up, you
19 know, a certain amount of weight or anything like that?

20 A. Yes.

21 Q. What about carrying items like groceries or
22 something like that, do you have problems doing that?

23 A. I bought a hand truck and I just put
24 everything in the hand truck. It's a four-wheel hand
25 truck. I'm not really carrying anything.

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1 Q. Would you say your issues, overall, are
2 slowly getting better or worse?

3 A. Worse.

4 Q. Okay. Do you think you can go back and do
5 your job as a cab driver right now?

6 A. No.

7 Q. What about car transporter, do you think you
8 could go back and do that work?

9 A. No.

10 Q. Do your injuries affect your ability to
11 drive?

12 A. Yes. Because I cannot drive for a long time.
13 I have to stop at least one hour and lay down in the
14 back of the car.

15 Q. Okay. And on that note, you live in Myrtle
16 Beach, I live in Charleston. You've come down to
17 Charleston before. Tell us kind of what you had to do
18 to make that trip?

19 A. I was stopping at gas station at Walmart on
20 the parking lot to lay down and rest. So, basically,
21 this trip takes me forever.

22 Q. Okay. So, typically, it's, I don't know,
23 two hours between Charleston to Myrtle Beach. Do you
24 remember how long it took you to go from Myrtle Beach
25 to Charleston?

1 A. Three and a half hours, at least.

2 Q. Do you worry about how you're gonna support
3 yourself financially in the future?

4 A. Yes.

5 Q. I asked you about riding a bike. Have you
6 gained weight since this accident, Mr. Kleuchenia?

7 A. Yes. A lot.

8 Q. Do you have any idea how much weight you
9 gained?

10 A. 40 pounds. Around 40 pounds, 50 maybe.

11 Q. Do you cook for yourself anymore?

12 A. No. I can't because you've gotta stand. You
13 gotta stand on the legs for a long time. What I'm
14 doing, I have a friend who owns a restaurant, and she
15 told me I can -- it's a buffet restaurant -- and she
16 told me I can come over and get whatever I want. Also,
17 sometimes, I'm buying food ready to go to the oven.
18 And I basically put it into the oven, set the timer,
19 and go to lay down and then coming back.

20 Q. Do you have any issues cleaning your
21 apartment?

22 A. Yes. My apartment looks really bad. That's
23 why I don't have video right now on.

24 Q. Okay.

25 A. That's why I went outside from the beginning

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1 because I can't find a place in the house which is
2 good.

3 Q. Because you're not adequately able to clean
4 your apartment?

5 A. No.

6 Q. So is it accurate to say that, you know,
7 you're embarrassed to have people over at your
8 apartment?

9 A. Excuse me?

10 Q. Is it fair to say that you're embarrassed to
11 have people over at your apartment?

12 A. Yes. Yes, absolutely.

13 Q. Okay. You're still able to dress yourself
14 and shower and bathe and all that stuff, right?

15 A. Yes.

16 Q. Do you feel like your sleep is affected at
17 all because of your injuries?

18 A. No.

19 Q. Okay. Other than I guess the bed-wetting and
20 stuff that we mentioned --

21 A. Yeah.

22 Q. -- you're able to sleep pretty good?

23 A. Yeah.

24 Q. Okay. What about socially, do you go hang
25 out with friends or anything like that?

1 A. No. Because I'm not enjoying that because I
2 start feeling pain in the lower back. And no any kind
3 of fun, basically. I can't.

4 Q. And on that note, you know, Viktar, you and I
5 have kind of talked about some other stuff, other than
6 this case, at this point. You know, there's a movie
7 coming out that you and I've been talking about. And I
8 asked you if you want to go see it, and you basically
9 told me you couldn't go see it, right? What is the
10 reason you can't go see that movie?

11 A. Because you have to sit in there. This movie
12 going a few hours. And it will be no -- I will not
13 enjoy it. I will be suffering from pain if I go to
14 cinema.

15 Q. So it's fair to say that even sitting upright
16 over time causes you pain, right?

17 A. Yes. Yes.

18 Q. Okay. When is the last time you've seen your
19 parents?

20 A. 2017.

21 Q. So before this accident?

22 A. Before this accident, yeah.

23 Q. What's the reason you haven't been back over
24 there to visit?

25 A. I'm not able to travel like this because you

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1 have to be in a plane for so many hours and you have to
2 be sitting. And that's gonna feel pretty bad.

3 Q. Do you feel like your personality has changed
4 at all since this wreck?

5 A. You mean if I became bad person or like . . .

6 Q. Well, and I'll ask you this, and I'm not
7 trying to embarrass you or call you out or anything.
8 But, you know, you and I have had a lot of
9 conversations over the years. And, you know, one of
10 the things you said in one of the conversations to me
11 was that you told me that you feel like your life is
12 kind of over. Can you explain to me what you meant by
13 that?

14 A. If you have to stay in a bed all the time,
15 you can't really do anything, you can't really enjoy
16 anything. Basically, what kind of life is that? It's
17 just -- that's what I was coming from.

18 Q. Yeah. Prior to this accident, did you have
19 hopes of getting remarried and having children?

20 A. Yes, of course. Absolutely. I was sure
21 about that.

22 Q. Do you still think that's something you'll
23 do?

24 A. As of the condition I am right now, it's
25 impossible. If somehow in the future by any kind of

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1 treatment, maybe some new treatment will be available
2 or something, is this gonna be improved? But right
3 now, I cannot be -- I cannot be a husband. I cannot be
4 a boyfriend. Nobody needs a person who lives in the
5 bed all the time.

6 Q. What's your hope moving forward, Viktor?

7 A. I will try to do my best to have medical
8 improvement. But since I have no options right now, I
9 have just to wait. Maybe some other options will come
10 up.

11 Q. So you're hopeful, you know, perhaps some of
12 the medical recommendations might help you down the
13 road. Is that right?

14 A. I hope so, yes.

15 Q. That's actually all the questions I have for
16 you, Viktor.

17 MR. WILLIAMS: Mr. Buffington, anything
18 else we need to go over?

19 MR. BUFFINGTON: I don't have anything,
20 no.

21 MR. WILLIAMS: Thanks, Viktor. You can
22 stick around, turn your sound off. The next witness,
23 Mr. Buffington, I have is Cynthia Grimley. I told her
24 11 o'clock, but I think she's around earlier. But if
25 we want to take a break, we can do that. And I can try

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1 to get in touch with her and see if she can get on at
2 maybe 10:30.

3 MR. BUFFINGTON: All right, yeah. So as
4 soon as she can, that's fine. Why don't we take a
5 ten-minute break, come back at about a little after
6 10:15 and see where we are. And if we need to take
7 another break until she gets on, we can do that.

8 MR. WILLIAMS: Okay, great.

9 MR. BUFFINGTON: All right. Thank you.
10 See y'all at about 10:15.

11 (Short break from 10:07 a.m. until
12 10:45 a.m.)

13 MR. BUFFINGTON: Let's go ahead and get
14 back on the record. And, Jared, I'll let you call your
15 next witness.

16 MR. WILLIAMS: Next is Cynthia Grimley.
17 Ms. Landry, will you please swear her in.

18 (Whereupon, the witness, CYNTHIA P.
19 GRIMLEY, was duly sworn.)

20 - - - - -

21 DIRECT EXAMINATION

22 BY MR. WILLIAMS:

23 Q. Ms. Grimley, can you tell us what you do for
24 a living?

25 A. I'm a vocational rehabilitation counselor.

1 And I provide expert witness testimony and job
2 placement services when needed as well as medical case
3 manager.

4 Q. And do you own your own company doing that?

5 A. I do.

6 Q. What's the name of that company?

7 A. Cynthia P. Grimley and Associates, LLC.

8 Q. How long have you owned that company?

9 A. Oh, since the '80s.

10 Q. Okay.

11 A. I'm not sure exactly. It's been a long time.

12 Q. I think that's long enough. Can you give a
13 rundown of your educational background?

14 A. I'm a -- you're gonna have to excuse me if I
15 need to clear my throat. This pollen is still getting
16 to me somewhat. So I apologize. I've got my water
17 here that I'll be sipping at and throat lozenges.

18 Okay. My master's degree is in special
19 education and I have a bachelor's degree in elementary
20 and special education as well.

21 Q. Can you give us a rundown of your work
22 history as well?

23 A. Yes. I've been self-employed in doing this
24 on my own since -- oh, my gosh -- since the '80s,
25 1986 maybe. And prior to that, I was self-employed at

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1 that time. And prior to that, I actually taught
2 special education classes for severely handicapped
3 students.

4 Q. Do you currently hold any certificates?

5 A. I do. I have a certified rehabilitation
6 certificate. Do they have my updated CV, by the way?

7 Q. I included a copy of the CV with a copy of
8 your report.

9 A. Because the copy that was with my report
10 was -- has been updated. So I just wanted to -- I'll
11 just go over what's changed. I just had some
12 certifications that were renewed. They had expired on
13 the old CV and I made them current. And I had a
14 professional presentation that was added to the current
15 CV.

16 But I'm a certified rehabilitation counselor,
17 a certified case manager. I'm a diplomat with and
18 board certified with the American Board of Vocational
19 Experts. I am also an international -- certified
20 international psychometric evaluator. And I have some
21 other certifications that I had obtained when I had
22 worked in various states that's listed on my resume.
23 But the ones I mentioned are the big ones that are most
24 important.

25 Q. What do you have to do to be certified as a

1 vocational evaluator?

2 A. Well, with the American Board of Vocational
3 Experts, to be a diplomat, you have to have at least
4 seven years work experience as well as providing --
5 meeting the educational requirements as well as
6 providing copies of work samples. I think it's like
7 two or three work samples. And then you have to have
8 professional references from people that have -- are
9 familiar with the way that you have testified I guess
10 is what I'm trying to say.

11 Q. Are you a member of any professional groups?

12 A. I am. I'm a member of the American Board of
13 Vocational Experts. Besides it being a certifying
14 body, it is also a membership organization. I'm a
15 member of the International Rehabilitation
16 Professional -- oh, gosh, let me think. It's called
17 IARP, is the name of it. International Associate --
18 International Rehabilitation Association of
19 Professionals I believe is what it's called. I'm
20 looking for it, and I don't see it here.

21 Q. And have you ever been published on any
22 topics in the field of vocational assessment?

23 A. That is it. It's the International
24 Association of Rehabilitation Professionals. I'm also
25 involved with several different committees on some of

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1 these -- what's been some of these professional
2 organizations. And on page 6 of my CV it lists the
3 different associations that I'm affiliated with. I'm
4 sorry, what was the last question?

5 Q. Yeah. I just asked if you've ever been
6 published on any topics in the field of -- in the
7 vocational field?

8 A. Yes, I have. And that is listed actually on
9 my CV. Do you want me to read those?

10 Q. No. It looks like there's a number of them.
11 Two pages worth it looks like.

12 A. Yes, there is. A lot of it has been related
13 to transferable skills analyses and the psychometric
14 evaluation certification. I served as board president
15 for that association. And we developed a new
16 credential called the -- it was the psychometric
17 eval -- the psychometric credential that we have,
18 psychometric meaning testing. So anyone that -- you
19 don't have to be a vocational expert to hold that
20 certification. We have a lot of psychologists.
21 There's a lot of different people. Anybody that
22 performs testing could hold that certification.

23 We have a lot of people in our organization
24 who hold the certification who test for the courts, for
25 example, to determine whether people are deemed

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1 eligible to be able to testify and be able to sit in a
2 jury trial; or test their competency, I guess, is what
3 it would involve.

4 So having the certification, learning more
5 about testing is very valuable to all of us who do
6 perform testing.

7 Q. Okay. And have you ever been qualified as an
8 expert by the court in the field of vocational
9 evaluations?

10 A. Yes, I have.

11 Q. Have you ever been found not to have been
12 qualified by a court as a vocational evaluator?

13 A. No, I have not.

14 MR. WILLIAMS: Mr. Buffington, I'm gonna
15 offer Ms. Grimley as an expert in the field of
16 vocational evaluation and assessment.

17 MR. BUFFINGTON: Thank you. Yes,
18 Ms. Grimley, is recognized as an expert in that field.

19 THE WITNESS: Thank you.

20 BY MR. WILLIAMS:

21 Q. Did you prepare a written report in this
22 case, Ms. Grimley?

23 A. Yes, I did.

24 MR. WILLIAMS: And, Mr. Buffington, I've
25 included a copy of the report marked for identification

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1 as Plaintiff's Exhibit No. 5.

2 (Plaintiff's Exhibit No. 5 was marked
3 for identification.)

4 Q. Ms. Grimley, if you could -- do you have a
5 copy of your report on hand in front of you?

6 A. Yes, I do.

7 Q. On the first page of your report, you note
8 some referral instructions. Can you just tell us what
9 you were asked to do in this case?

10 A. Yes. I was asked to -- I was asked to
11 evaluate -- okay. I have a very difficult time
12 pronouncing your client's name. I like to call him
13 Mr. K or Viktor. He told me to call him Viktor.

14 Q. I think we're all on the same page there.

15 A. I don't know. I heard Mr. Buffington do a
16 pretty good job there.

17 Q. I think Viktor or Mr. K would be fine,
18 whatever you're comfortable with.

19 A. Yeah. I'll call him Mr. K. I was asked to
20 provide a vocational evaluation for Mr. K to assess his
21 past work history and to determine whether or not there
22 were any jobs that he might be able to perform in the
23 local and national economies based upon his work
24 restrictions as a result of the injury.

25 Q. Okay. And then on page 1 and 2 of your

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1 report you go into your evaluation method. Do you have
2 a standard protocol or method you use when you do these
3 vocational valuations?

4 A. I do. It's the same for -- it's the same for
5 all of my vocational evaluations, even if I do a
6 vocational evaluation for domestic cases for -- you
7 know, checking someone's employability is what it's all
8 about. So anytime there's a question about
9 someone's -- a person's employability status, I could
10 be retained to determine if there are any jobs that
11 they are able to perform.

12 So, yes, it is a standard methodology. I use
13 a transferable skills analyses program for all of my
14 cases. I use them across a program which has been
15 historically validated -- or proven to be reliable and
16 valid throughout the years.

17 Q. On the first page of your report you list out
18 all the documents and everything you reviewed in this
19 case. I don't think we need to list them all out. But
20 is it safe to say you reviewed an extensive amount of
21 medical records in this case?

22 A. Yes, it is.

23 Q. Did you also review an FCE report?

24 A. Yes, I did.

25 Q. Did you review some statements from Dr. Cook

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1 as well?

2 A. Yes, I did.

3 Q. On the second page of your report you note
4 family and social history. Can you just summarize this
5 information for us, please?

6 A. Sure. Mr. K, he was born on February 27th of
7 1981 in Belarus. He's now 43 years old. He was 41 at
8 the time that I did this evaluation. He came to the
9 United States at a very young age, at age of 22. And
10 he lives in Myrtle Beach. Well, he obtained his green
11 card and he added that he now needed to apply for his
12 citizenship. So he indicated that he was intending to
13 do that.

14 He lives in Myrtle Beach. And he described
15 that it was a suburban two-story apartment. It's two
16 stories but he's able to enter on a first level, and he
17 only uses the downstairs level to get into his
18 apartment. There's public transportation that's
19 available but it's not that close to his home.

20 THE WITNESS: Ms. Court reporter, am I
21 speaking too fast?

22 COURT REPORTER: You're fine. Keep at
23 your pace. You're good.

24 THE WITNESS: Okay. I know I tend to
25 talk fast. So if I need to slow down, please let me

1 know.

2 Q. And have you talked to Mr. Kleuchenia since
3 the initial valuation you did?

4 A. I did. I called him and we spoke on the
5 phone for just about ten minutes. I basically wanted
6 to know if his condition had improved, if anything had
7 really changed, and he told me no. But he really
8 thinks that his physical condition has gotten worse.
9 And I asked him how, and he said he feels like he's in
10 more pain. And he determines that by the frequency of
11 how much and how often that he needs to lay down.

12 He also indicated that he uses crutches
13 around the house. I asked him if he had a walker.
14 Some of these were the same questions I had asked him
15 during our initial interview. I asked him if --

16 Q. I'm sorry. On the third page of the report
17 there at the top you talk about during your evaluation
18 with him he had to take a break. Can you explain what
19 happened there?

20 A. Yes. He is in more pain when he's in a
21 upright position. And he reported that to me when we
22 had our phone call as well. He has to sit in a
23 recliner chair. And if I recall, he was in a
24 zero-gravity chair when we did our evaluation, and he
25 did need to take a break. We actually, you know,

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1 stopped for awhile while he could go lay down. So he
2 did have to do that while we were having our
3 evaluation.

4 Q. Do you remember approximately how long that
5 initial interview took?

6 A. Yes. It began approximately around 1:00 p.m.
7 and lasted until 3:15 p.m. So 2 hours and 15 minutes.
8 And we took a 15-minute break.

9 Q. And then in the next section of your report,
10 you move onto his educational background. What's is
11 your understanding of his educational history?

12 A. Well, he attended four years at a state --
13 which was considered -- it was a high school in
14 Belarus. And he left. He didn't finish. It's
15 five years for graduation, which is pretty common with
16 a lot of the European schooling structures that I have
17 had experienced in my time of doing this type of work.
18 So he didn't complete the schooling because he left to
19 come to the United States. So he basically did not
20 have a high school diploma even from his home country.

21 English is his second language. He speaks
22 Russian as his primary language. And he indicated that
23 he was limited on his ability to read and write
24 English. He knew very little when coming to the United
25 States but learned once he got here.

1 Q. And then you note that he had a medical
2 certificate from South Carolina Department of
3 Transportation that had been deactivated. Do you know
4 if that's required for his job in any way?

5 A. It is required. He doesn't have to have --
6 doing what he was doing as a cabdriver and hauling
7 cars, he did not have to have a commercial driver's
8 license, what's commonly known as a CDL. And he didn't
9 have to have that. But he did have to have the medical
10 certificate from the State, from the Department of
11 Transportation of South Carolina. And that has been
12 deactivated. I was sent a piece of paper, document,
13 indicating that it had been deactivated. To my
14 knowledge, that has not changed.

15 Q. Okay. And then you go onto the medical
16 information. And, again, I think you list out the
17 specific records you reviewed on the first page of your
18 report. But I just want to ask you, when you're
19 reviewing the medical records for these types of
20 evaluations, what type of information are you looking
21 for in the records?

22 A. Well, I'm looking for how the person
23 functions, what their limitations are, and what they're
24 able to do. And I need to have that because I have to
25 develop a pre- and post -- a pre- and post-profile for

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1 the person that I'm evaluating. So pre would be prior
2 to any kind of -- in this case -- any kind of an injury
3 and how he was functioning prior to this accident. The
4 accident, I believe, was 2018, July 17th of 2018.

5 So I look at and evaluate what the person is
6 able to do and how they're functioning as well as their
7 whole entire work history, educational levels, and
8 those types of things. So I'm looking at their
9 functional abilities. And then that's the pre-profile.
10 And then post-profile would be the modifications that I
11 would make to the transferable skills analyses, and
12 that is determined by the medical records that I
13 review. I don't make that determination. I depend
14 upon the medical records, including the functional
15 capacity evaluation, doctor statements, doctors'
16 diagnoses, those kinds of things to determine what the
17 post-profile would be.

18 Q. And when you were going through
19 Mr. Kleuchenia's medical records, do you recall the
20 medical records themselves making any kind of mention
21 to his physical limitations?

22 A. Yes, I did.

23 Q. Do you have any details on what any of the
24 medical records said as far as what the physicians
25 stated about his limitations?

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1 A. Well, yes. They were consistent. I have to
2 add that. I noticed that -- I look for that kind of
3 thing as well. To determine whether or not what the
4 person is reporting to me as far as their functional
5 abilities, what they're able to do, how often they go
6 out, you know, how that matches up with their
7 subjective complaints to the medical records, okay. So
8 I found -- I didn't find any discrepancies. There was
9 nothing that, like, stood out to me.

10 So in addition to him having several
11 surgeries, back surgery -- his back seems to be what
12 the biggest issue is for him right now, and has been.
13 And Dr. Poletti and Dr. Cook had recommended back
14 surgery, but they wanted him to try other interventions
15 first. And Dr. Poletti had recommendations that
16 restricted him from heavy repetitive bending, lifting,
17 twisting, pushing, pulling, and heavy repetitive
18 lifting greater than 30 pounds. And Dr. Cook ended up
19 having very much the same kinds of work restrictions as
20 well.

21 Q. And then it's my understanding that you
22 mentioned there was an FCE performed in this case,
23 correct?

24 A. Yes. That's what I was going to say. The
25 functional capacity evaluation was done on July 20th of

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1 2022 by Philip Lowe who is a physical therapist and
2 certified disability examiner. And he placed Mr. K at
3 a sedentary to light range of physical demands and did
4 state that -- he made a comment that he did not -- that
5 Mr. K did not demonstrate the necessary physical
6 demands to perform his usual and customary job duties
7 as a cabdriver or a car transporter. And I would agree
8 with that. Do you want me to explain why?

9 Q. Well, we'll get to that in just --

10 A. Sorry. I'm jumping ahead a little.

11 Q. Okay. In regards to the FCE itself, are
12 those often used in your evaluations and can they be
13 helpful?

14 A. They are helpful. Although, it gives an
15 example of what the person is -- it's like a snapshot
16 example of what the person is able to do during that
17 given period of time. But it's part of something that
18 is very commonly used in evaluations like that I
19 perform or others in my capacity would also perform.
20 It's what I call -- it's a triangulation process. It's
21 using that as a tool along with all the other medical
22 reports along with listening to subjective complaints,
23 how he performs with his self-help skills and his daily
24 living, those kinds of things. So it's a tool and it's
25 one of them that I would use.

1 Q. And in this particular case, did any of
2 Mr. Kleuchenia's treating physicians review the FCE and
3 give an opinion on the FCE?

4 A. Yes. Dr. Cook did as well. He agreed with
5 the functional capacity evaluation.

6 Q. And if I understood you correctly, the
7 findings of the FCE limited him to sedentary to light
8 duty. Is that correct?

9 A. That's correct.

10 Q. Did the FCE note that Mr. Kleuchenia put
11 forth a consistent effort in the evaluation?

12 A. It did. Yes, it did.

13 Q. Did the FCE note that the findings were
14 consistent and reliable?

15 A. Yes, it did.

16 Q. And the next portion -- well, in that same
17 section of your report, the medical information, you
18 outlined his medications and stuff. Can you just tell
19 us what medications he's on?

20 A. Well, this was at the time of the evaluation.
21 And I realized as I was reviewing the file that I did
22 not ask him if anything had changed. He told me
23 nothing had changed, but I specifically did not ask him
24 about the medication. One of them was allopurinol,
25 300 milligrams, and he was taking that once daily in

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1 the evening. And then indomethacin. Not sure if I'm
2 saying that right.

3 Q. And then on page 5 of your report you go on
4 to note some of his subjective complaints and physical
5 limitations. Can you summarize your findings here?

6 A. Well, it was basically consistent with what
7 he was reporting to me as just generally speaking. And
8 then when we went through and broke this down into
9 specific body mechanics. It was consistent. His
10 biggest issue was the standing and the walking and
11 actually sitting. He only reported able to do that in
12 very short intervals where before he needed to take a
13 break. He needed to alternate the sitting, standing,
14 and walking.

15 And then even reported that the driving,
16 after an hour, he must stop to rest. He gave an
17 example that he had to go to Philadelphia for a
18 physician's appointment and it took him two days
19 because he had to stop every hour and recline his seat
20 in his Jeep all the way back. He said he can get it to
21 lay flat. And he would have to recline it to be able
22 to lay down in his Jeep. And he described that trip as
23 taking two days.

24 Q. Okay. And moving down onto the bottom of
25 that page 5 and to the top of page 6 there, did he note

1 any kind of issues with doing household chores or
2 anything like that?

3 A. He did report that he was able to dress
4 himself and do his own laundry; and he was able to
5 shower independently but it was difficult because
6 standing would hurt his foot. He did not have a shower
7 chair or a grab bar. And it was suggested that he
8 might want to consider those for safety purposes. He's
9 able to go to the grocery store but uses a hand truck
10 to get the groceries inside so that he's not having to
11 lift them. It's easier for him to put things on a hand
12 truck to be able to push them. And, as I mentioned
13 before, he's able to park right by the door and it's
14 all flat on one level to be able to get inside his
15 apartment. Or he has friends that will help him go
16 grocery shopping if he needs to lift something heavy.

17 I'm not sure -- I can't really recall -- if
18 he was using delivery services on occasion. I don't
19 see that it was noted in my report. But for some
20 reason that's kinda sticking in my head that he
21 sometimes occasionally used a delivery service for
22 groceries.

23 Q. Okay. Did he note any kind of issues with
24 cleaning his apartment or anything like that?

25 A. Oh, yeah. He said he can't even vacuum. In

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1 fact, I always ask -- I had asked and requested that I
2 meet with him, and I wanted to go to his place, his
3 apartment. And he was, as reported to me, that he said
4 he -- he was embarrassed that his apartment looked as
5 messy as it did because he's not able to clean it.
6 He's not able to cut the grass. He has a small patch
7 of grass out back. But he said, luckily, it's in a
8 shaded area and it doesn't grow that much. But there's
9 many things that he's not able to do including cleaning
10 his own place.

11 Q. And then moving down to his employment
12 experience. What is your understanding of his work
13 history?

14 A. When he first came -- well, his only work
15 history was in the United States. And from 2023 to --
16 from 2003 to 2005 he worked as a gas station attendant
17 at a mini-mart in Myrtle Beach which required stocking
18 and cleaning and cashiering. And then he was
19 self-employed as a taxi driver from 2005 to 2018. So
20 that was pretty much the extent of his work history.
21 He drove as -- he first drove for a company called
22 Diamond Cab and then -- he was an employee at the time.
23 And then he went to work as an independent contractor.
24 He paid a fee to them to be able to utilize the radio.
25 And he reported that he averaged \$40,000 to \$50,000 a

1 year, annually, without the expenses.

2 So then he had started -- for about a year
3 prior to his accident, he had started a transport
4 company which he drove a flatbed truck. And he was
5 driving and transporting vehicles from the South to the
6 North. And he would be required to strap down the
7 vehicles onto the flatbed truck. And at the time, he
8 reported that he still owned that truck. So he was
9 very much involved in setting this up as his full-time
10 employment driving this flatbed truck and working as a
11 car transporter. He owned his truck, but he told me
12 that he needed to sell it. So I don't know whether he
13 did that or not.

14 Q. Okay. Did you get an idea of how much
15 Mr. Kleuchenia was expecting to earn as a car
16 transporter when he worked full-time?

17 A. Yes. There was -- let me see -- there was an
18 affidavit that was provided to me. And it's not
19 jumping out at the moment. But it was a hundred
20 thousand a year is what I recall.

21 Q. The affidavit you referred to, is that the
22 affidavit of Alex Yanushko?

23 A. Yes. Yes.

24 Q. Okay.

25 A. Yes, that's exactly what I'm referring to.

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1 Q. What's your understanding -- (audio
2 disruption) -- forth there?

3 A. I'm sorry, say that again.

4 Q. What is your understanding of the wages that
5 Mr. Yanushko noted in his affidavit?

6 A. That he was able to learn \$500 a day and
7 approximately \$100,000 a year is what I recall. I have
8 that somewhere in these papers. If you need me to pull
9 that up, I can.

10 Q. Did he note in the affidavit as well
11 Mr. Yanushko had other drivers earning more than a
12 hundred thousand dollars a year?

13 A. I believe that he did. And I also think that
14 that's a very conservative estimate, the hundred
15 thousand dollars a year. When I read that, that was my
16 exact thought was that this was very conservative.
17 Because truck drivers typically make that or more, and
18 especially being a long-haul driver. And I did some
19 brief calculations just for my own understanding. And
20 I took that as, like, if he worked and earned \$500 a
21 day at five days a week, which would be \$2,500 a week,
22 2500 a week, times 50 weeks, giving him two weeks off
23 for vacation, comes out to 125,000 year. So I thought
24 that the hundred thousand dollars was very
25 reasonable -- an estimate of the

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1 hundred-thousand-dollar earning, annual earning
2 capacity, as the car transporter was very reasonable
3 and even conservative.

4 Q. And then on page 7 of your report you get
5 into the analysis of the employment experience and you
6 go on to talk about dictionary of occupation titles and
7 the McCroskey vocational scale. Can you just tell us
8 what's going on here?

9 A. Yes. Excuse me a minute.

10 So the way that we come up with this pre- and
11 post-profile that I mentioned earlier is we look at the
12 past work history. And in this case, I used the
13 Dictionary of Occupational Titles, the tractor-trailer
14 driver and the taxi driver. Both of these jobs give us
15 what we call worker-trait factors. So these
16 worker-trait factors are -- there's 24 of them that are
17 the most commonly held and most of the jobs that are in
18 the Dictionary of Occupational Titles.

19 And, Mr. Buffington, I'm not sure how much
20 you're aware of how we do these analyses. But we
21 depend upon a lot from the Department of Labor and the
22 Bureau of Labor Statistics. And they give us tools
23 such as the Dictionary of Occupational Titles, the
24 classifications of jobs. And this is how we determine
25 someone's -- a person's ability to be able to work in

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1 these certain capacities of jobs.

2 So when you do transferable skills analyses,
3 I define these job titles by DOT number and then that
4 gives me all of these worker-trait factors that I need
5 to know so that I'm able to then determine how to come
6 up with the pre-profile -- or the post-profile that I
7 need to do the transferable skills analyses, to be able
8 to run the computer program to be able to determine
9 what kinds of jobs are available.

10 So both of the jobs that he performed were
11 considered at medium exertional level which requires
12 lifting up to 50 pounds. And there's other things that
13 are noted as well. But 50 pounds is a key marker that
14 most people will use including the functional capacity
15 evaluators. Okay. Jared, am I -- you want me to keep
16 going or --

17 Q. Sure. You can go on.

18 A. I'm sorry?

19 Q. Sure. Go ahead.

20 A. So these jobs were determined to be in the
21 medium classification of work. And the functional
22 capacity evaluation indicated sedentary to light. So
23 there's no such thing. If you can't do a full range of
24 light work, which is lifting up to 20 pounds and to be
25 able to do some walking and sitting and standing, it's

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1 in excess of a sedentary job. Sedentary jobs will
2 allow a person to -- they need to be able to lift up to
3 10 pounds and they sit most of the day.

4 So Mr. K is really not even functioning at a
5 full range of sedentary. But in order for me to be
6 able to run a transferable skills analysis, I had to
7 put something in there. So I ran and used the
8 sedentary qualification for my transferable skills
9 analyses.

10 Q. Okay. When you ran the analysis over on
11 page 8, it looks like you come up with some results
12 there in doing that. Can you summarize the results of
13 that analysis?

14 A. Well, yes. And it should be noted, too, that
15 his profile matched 170 of the most frequently hired
16 for jobs in Horry County, which was 14 percent of the
17 jobs database. So the database is large, but not every
18 one person is able to perform all the jobs in a
19 particular county, not you or I. So it does -- it
20 shows that he was able to match 170 of them as
21 frequently hired for jobs. And then I ran the profile
22 at transferability of skill level at 60 percent or
23 above. It's my professional opinion that a person has
24 to have more than 50 percent, at least 60 percent or
25 above, of skills of transferability in order to be

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1 considered competitively and gainfully employed and to
2 be able to compete in the labor market. So he did not
3 have that once I entered the restrictions.

4 And I reduced -- and I should add, too, that
5 I reduced the work restrictions to sedentary as well as
6 I made minimal adjustment to it. And it was also -- I
7 reduced that motor coordination. Eye, hand, foot
8 coordination were reduced to below average. That was
9 all demonstrated from him -- his functioning levels
10 with the functional capacity evaluation and also what
11 he had reported to me.

12 So when I reduced that and put those
13 qualifications in, that's how I came with the
14 post-profile. And when I run the transferable skills
15 analyses, it came up and it indicated that there was a
16 hundred percent loss to the labor market access based
17 upon the data that was provided to me.

18 Q. Okay. And just so I understand, the 170
19 profile match that you referenced to, that was his
20 pre-injury status based on his, you know, before injury
21 abilities, correct?

22 A. That is correct.

23 Q. Okay. Then after you ran it based on his
24 post-injury functional limitations, no jobs showed up
25 that matched his abilities. Is that accurate?

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1 A. That is accurate. At 60 percent or above,
2 correct. But he needs that to be competitively
3 employed.

4 Q. And then on the last section there of page 8,
5 of page 9, you go over the analysis of the lost
6 opportunity earning capacity. Can you tell us what
7 your analysis there is?

8 A. What page are you referring to?

9 Q. Page 8 and then page 9.

10 A. Oh, yeah. Well, I made a statement that
11 there's no patterns of jobs within the labor market
12 match -- that matches functioning to support that he
13 could secure suitable gainful employment with a
14 diligent job search. And it wasn't expected that a
15 rehabilitation ever would remove any of these barriers.
16 So his ability to resume gainful employment is a
17 permanent condition in my opinion. And his functional
18 limitations are due to his injury and limits his past
19 work history, and the transferable skills yielded zero
20 jobs.

21 Q. So, essentially, he's lost a hundred percent
22 loss of employability in the competitive labor market.
23 Is that correct?

24 A. Yes, that's correct. Based upon his skills,
25 his current skill levels, and what he has available to

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1 him right now, yes.

2 Q. And then you end your report with just a
3 summary of your opinions. Can you just summarize those
4 for us, please?

5 A. On page 9, the summary? Would you just like
6 to read those in for the record?

7 Q. Sure.

8 A. Mr. K currently has functional impairments as
9 a result of his injury on July 17, 2018. The
10 transferable skills analyses indicates that there are
11 no jobs within his local labor market that he has the
12 skills to perform given his work restrictions. He had
13 a steady work history up until the time of his injury
14 with limited transferable skills. Mr. K did not have
15 full access to all the jobs in Horry County,
16 South Carolina, prior to the 2018 injury. Mr. K is not
17 able to compete in the labor market because of his
18 functional limitations. And this is a permanent
19 condition.

20 It is my professional opinion that Mr. K has
21 lost his competitive edge to the labor market due to
22 the functional impairments caused by his injury of
23 July 17, 2018. His impairments and the functional
24 limitations that have resulted from his injury to a
25 reasonable degree of vocational certainty have

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1 diminished and precluded his access to the competitive
2 labor market.

3 Q. There's some additional documents provided
4 with your report. It's a MTSP profile report and then
5 MVQA reports. Can you just tell us briefly what those
6 are in general?

7 A. Yes. Those are just the supporting documents
8 from the transferable skills analyses that I include
9 with my report. It's all summarized in my report. I
10 include those because it used to happen when I didn't
11 include them and I had them in my file and I was
12 deposed that it took so much time with attorneys not
13 understanding and asking me questions about it when
14 they're just seeing it from my file for the first time.

15 So I started to include it with the report.
16 And then that kind of summarizes it and pulls it
17 altogether because it's my supporting documents that
18 summarizes my opinion. So all of those -- all of the
19 MTSP and all of those reports, some of those are just
20 job descriptions and then identifies the worker-trait
21 factors. Then it shows the pre- and post-profile
22 analyses. And then as you go on further into the
23 report, there's actually the symbols and codes that
24 explain all of those. And then later on there's a
25 four-page reference section and then my CV.

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1 Q. So all of those additional documents are
2 essentially you showing your work and your analysis in
3 the transferable skills analysis. Right?

4 A. That's correct.

5 Q. What information would you give to an
6 economist in this case to calculate late lost wages and
7 lost earnings?

8 A. Well, they would need to have a pre- and
9 post-profile. So they would need to know what his
10 earnings were prior. So that would've been that 40 to
11 50,000 annually is what he was earning. Or tax
12 returns. Those would be items that are self-reported.

13 So you need a pre-profile and a post-profile.
14 So his earnings of 40 to 50,000. And then I would use
15 this affidavit with it because I would consider that a
16 bona fide job offer. He was already doing that for
17 this gentleman and already had purchased his flatbed
18 truck. He was transitioning at the time to go into
19 that full-time. So that affidavit I would find to be
20 very valid as a bona fide job offer at the hundred
21 thousand dollars a year. And I would urge an economist
22 to use the hundred thousand dollars for the
23 post-profile earnings.

24 Q. During your conversations with Mr. Kleuchenia
25 and your evaluation, did you have any reason to, you

1 know, question his credibility or truthfulness or
2 anything?

3 A. No, I did not.

4 Q. Ms. Grimley, have all the opinions you
5 provided here today been to a reasonable degree of
6 vocational certainty?

7 A. Yes, it is.

8 Q. All right. That's all the questions I have
9 for you. I appreciate your time of being here today.
10 Thank you, ma'am.

11 A. Thank you.

12 MR. BUFFINGTON: Thank you, Ms. Grimley.
13 You're dismissed. Hold on. Heater, do you have any
14 questions for Ms. Grimley before we let her go?

15 COURT REPORTER: I mean, I have a
16 spelling question if you want me to go ahead and ask
17 that.

18 THE WITNESS: Is it McCroskey?

19 COURT REPORTER: No. It would be the
20 last name for Alex. Is that the one you're referring
21 to? Alex something.

22 MR. WILLIAMS: I can give you that.
23 It's Yanushsko, Y-A-N-U-S-H-S-K-O.

24 COURT REPORTER: I'm glad I asked
25 because I completely got it wrong.

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1 THE WITNESS: Do you need the spelling
2 for McCroskey?

3 COURT REPORTER: No. I don't. I've got
4 everything else, yeah.

5 MR. WILLIAMS: Just for the record,
6 Mr. Buffington, I need to move Exhibit No. 6, a copy of
7 Ms. Grimley's report, into evidence.

8 MR. BUFFINGTON: Exhibit No. 6 is
9 admitted into evidence.

10 (Plaintiff's Exhibit No. 6 was received
11 into evidence.)

12 MR. BUFFINGTON: All right.

13 Ms. Grimley, we'll dismiss you from the hearing.

14 THE WITNESS: Thank you very much.

15 MR. WILLIAMS: Thank you, ma'am.

16 THE WITNESS: Have a good day, everyone.

17 MR. BUFFINGTON: It's 11:30 you got?

18 MR. WILLIAMS: Dr. Joye at 12 and
19 Dr. Wood at 1. So I guess we'll, take a little break
20 if that's okay.

21 MR. BUFFINGTON: All right. That's
22 great. Let's take a break and be back right at noon
23 will be fine.

24 (Short break from 11:28 a.m until
25 12:01 p.m.)

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1 MR. BUFFINGTON: Call your next witness
2 and have the court reporter swear him in.

3 MR. WILLIAMS: Plaintiff calls
4 Dr. Todd Joye.

5 (Whereupon, the witness, DR. TODD
6 PATRICK JOYE, was duly sworn.)

7 - - - - -

8 DIRECT EXAMINATION

9 BY MR. WILLIAMS:

10 Q. All right. Dr. Joye, thank you for being
11 here today. Why don't we start by just telling us what
12 you do for a living, please?

13 A. I am an interventional orthopedist treating
14 chronic pain issues in the spine and orthopedic joints
15 of the body.

16 Q. Could you give us a rundown of your
17 educational background?

18 A. Sure. I'm assuming you mean after college?

19 Q. Yes, sir.

20 A. Medical school was at MUSC in Charleston. At
21 the completion of that, I did a four-year
22 anesthesiology residency followed by a one-year
23 fellowship in interventional pain management. And
24 along the way became board certified in anesthesiology
25 as well as interventional pain management.

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1 Q. And can you also give us a summary of your
2 work history since graduating from medical school?

3 A. Yeah. In one form or another, it's been the
4 same for at least 24, 25 years or so. The name of the
5 practice changed periodically. But, essentially, I
6 came out of my fellowship and opened up an
7 interventional pain management practice in Charleston.
8 I've been employed by a large anesthesia group in
9 Charleston that works out of Roper St. Francis Hospital
10 called Anesthesia Associates. They've been my constant
11 employer for the past 25 years or so. My practice name
12 has changed. You know, once in my career I was in a
13 practice called Pain Associates of Charleston, which I
14 founded, but it had two other doctors in it. And
15 during the course of many years, attrition and
16 retirements have left me the only man standing. So the
17 practice is now InterveneMD, but technically the same
18 employer.

19 Q. And I think you touched on it. Are you
20 affiliated with any hospital?

21 A. I'm affiliated with the Roper hospital system
22 in Charleston.

23 Q. Could you tell us briefly what you do in your
24 private practice: what types of patients you're seeing,
25 what type of treatments you're providing, just

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1 generally?

2 A. Sure. Over my career, most of these patients
3 have had chronic pain issues in one form or another.
4 I've seen patients for many years with pain everywhere.
5 But it seems like a majority of the people that I see
6 have spine-related issues and joint issues. These
7 could just be everyday living. I certainly see
8 patients as a result of accidents. Whether it's car
9 accidents or falls or any other thing, I see them
10 before after surgery to try and straighten things out.

11 You know, for years people that do what I do
12 have kind of been the last stop for patients where we
13 traditionally had nowhere else to send people. So we
14 had to figure out how to get them better and get them
15 more functional. Some of that has changed a little bit
16 over the years with me doing other things in my
17 practice with regenerative medicine and trying to get
18 it to where the body can heal itself. But, primarily,
19 I'd say at least three quarters of the people that we
20 see have some degree of a spine or orthopedic ailment.

21 Q. And are you board-certified in any areas?

22 A. Yes, sir. Board certified in anesthesiology
23 as well as interventional pain management.

24 Q. Do you know what organization you're
25 certified by?

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1 A. Yes. So the board that handles those is
2 called the American Board of Anesthesiology. Almost
3 every -- or perhaps every accepted subspecialty board
4 in medicine is supervised by an organization called the
5 ACGME, the American College of Graduate Medical
6 Education. They kind of oversee all the residency
7 programs and all subspecialties in the whole country.

8 Q. And are you also certified in the area of
9 life care planning?

10 A. Yes, sir. I am.

11 Q. How long have you been certified in that
12 area?

13 A. Since about 2017.

14 Q. Is there a specific organization that
15 certifies you in the life care planning aspect?

16 A. Yes. That's an organization called ICHCC,
17 International Commission of Healthcare Certification.
18 The life care planning curriculum, I believe you can do
19 that in various places. The organization that I chose
20 was out of Hendersonville, North Carolina, called Fig,
21 F-I-G, Education. And that was 120 hours of
22 self-study. And then it was a trip up to
23 Hendersonville for a weekend for in-person, the final
24 phases of that training with, you know, group sessions
25 and, you know, kind of orally defending what you were

1 doing and then there's a written examination.

2 Q. Any idea how many life care plans you've done
3 throughout your career I guess since 2017?

4 A. I don't have a firm number. I suspect it's
5 about 75.

6 Q. Have you ever testified in the area of life
7 care planning?

8 A. Yes, sir.

9 Q. Have you ever been qualified by a court in
10 the area of life care planning as an expert?

11 A. Yes. I don't -- you know, I don't know how
12 you guys do that. But I've never been disqualified. I
13 assume that maybe every deposition I do, I'm qualified.
14 You know, so I guess I couldn't say -- better for me to
15 say I've never been disqualified.

16 Q. Yeah. That's fair. Nobody has ever told you
17 that you can't qualify as a life care planner. Is that
18 accurate?

19 A. Correct.

20 Q. Okay.

21 MR. WILLIAMS: Mr. Buffington, I would
22 offer Dr. Joye as an expert in the areas of general
23 medicine, pain management, and life care planning?

24 MR. BUFFINGTON: Yes, sir. I find
25 Dr. Joye to be qualified in those areas of expertise.

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1 MR. WILLIAMS: Thank you,
2 Mr. Buffington.

3 Q. Dr. Joye, can you just tell us what you were
4 hired to do in this case?

5 A. I was asked to complete a life care plan for
6 Mr. Kleuchenia based on -- and try to estimate future
7 medical care that he would need for injuries relating
8 to his accident.

9 Q. Did you personally meet and communicate with
10 Mr. Kleuchenia during this process?

11 A. Yes. I brought him here. I mean, the
12 process itself was I reviewed his medical records to
13 get an understanding about what his injuries were and
14 if I could contribute my expertise. I brought him to
15 Charleston. I guess, technically, I brought him to
16 Mount Pleasant since that's where my office is. And I
17 interviewed him, examined him, and then rendered the
18 plan. I did follow up with him mid February, not in
19 person but with a phone call, to verify the findings
20 that I had from his life care plan were still relevant.

21 Q. And I think you just touched on this. In
22 doing your evaluation, you were asked to, you know, get
23 a copy of all the medical records and everything to
24 review. Is that correct?

25 A. Yes, sir.

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1 Q. Did you review those medical records in
2 formulating your opinions?

3 A. Yes, sir.

4 Q. And did you ultimately prepare a written life
5 care plan report in this case?

6 A. Yes, sir.

7 Q. Do you have a copy of your report on hand,
8 Dr. Joye?

9 A. Yeah. I can pull it up on my computer I'm on
10 right now, yeah.

11 Q. Good. Just let me know when you have it up.

12 MR. WILLIAMS: And Mr. Buffington, I've
13 marked a copy of Dr. Joye's medical life care plan for
14 identification as Plaintiff's Exhibit No. 6 in this
15 case.

16 (Plaintiff's Exhibit No. 6 was marked
17 for identification.)

18 BY MR. WILLIAMS:

19 Q. Just let me know when you have it up,
20 Dr. Joye.

21 A. I do.

22 Q. Okay. On the first page of the report and
23 then moving onto the second page, you just kinda go
24 through a general summary of what exactly life care
25 planning is. Can you just tell us generally what that

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1 is?

2 A. Yeah. I mean, I put it in words on the first
3 and second page of that report. So it's just a process
4 of applying methodological analysis to make diagnostic
5 conclusions and opinions regarding physical and mental
6 impairment or disability. And then quantifying that in
7 a cost projection and figuring out what individuals are
8 gonna need for X number of years or for their life to
9 meet the objective of identifying -- and supporting
10 conclusions identifying of what someone is gonna need
11 to the best of my ability.

12 Q. Okay. And when you're doing these life care
13 plans, do you use the same basic general methods that
14 you described earlier with each of these life care
15 plans?

16 A. Yeah. And, you know, honestly, it's not --
17 you know, it's not much different than what we do as
18 physicians every day, anyway. If a patient comes in
19 and they've got a long-standing problem is, you know,
20 we try to get medical records, we try to review them if
21 we can before we see the patient to see if this is
22 something that we can contribute to.

23 In my case, I don't do life care plans for
24 injuries that I don't see in my clinical practice. And
25 that's one reason I talk to anybody who would like my

1 help in trying to determine is this something I feel
2 comfortable with. For instance, I don't do pediatric
3 cases; I don't do severe brain injuries; I don't do
4 severe spinal cord injuries with paraplegia and people
5 requiring nursing care and tracheotomies and those
6 types of things; I don't do burns.

7 And so I really make sure that it falls
8 within the wheelhouse that I feel comfortable
9 addressing and injuries that I see every day in my
10 medical practice. And so it's a records review. And
11 in Mr. Kleuchenia's case, I reviewed the records and
12 determined that, yeah, these are injuries that he had
13 that were consistent with what I felt comfortable
14 treating.

15 We may get into it a little bit further. He
16 had an issue with the floating kidney and a hernia,
17 which I really didn't address in my life care plan.
18 Obviously, his main injuries are to his foot, his knee,
19 and his back. And since those were a majority of his
20 injuries, I felt like I could contribute to this case.
21 So a review of the records. And once I feel
22 comfortable with -- that I got a handle on his injuries
23 then we bring him in, interview him, ask him questions.

24 In terms of the life care plan, it's
25 questions so I can get an idea about how these injuries

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1 are affecting him with his functional status, with his
2 pain, with his sleep, just how these are affecting his
3 hobbies and, overall, his life. And then it's an
4 examination just like we would do in the office for a
5 patient. And then I formulate my opinions and
6 diagnoses, if appropriate, and then set out to perform
7 the medical cost projection.

8 Q. Okay. On the second page of your report
9 there you sort of list out all the records that you've
10 reviewed in this case. I don't think we need to go
11 through them bit by bit. But it's fair to say you've
12 reviewed an extensive amount of medical records for
13 Mr. Kleuchenia?

14 A. Yes, sir.

15 Q. In addition to the medical records, it looks
16 like you've reviewed some physician statements from his
17 treating physician as well. Is that correct?

18 A. Yes, sir.

19 Q. And A lot of those physician statements sort
20 of put forth that physician's opinion on future medical
21 recommendation as well?

22 A. It did. I think in this case also, those
23 statements address causation as well with this for him.
24 And so I certainly think it's valuable to review those.
25 And those are used when I make my report.

1 Q. So you basically -- you reviewed those and
2 then you relied on those statements in formulating your
3 opinions in this case?

4 A. I do. Yes, sir, I do.

5 Q. And then move over to page 3 of your report.
6 At the top, you give sort of a brief description of
7 each of his injuries. And as you noted previously,
8 we're gonna sort of exclude the kidney issues and
9 stuff. But as far as the right knee, lower back, and
10 left foot, could you give us a brief explanation of
11 what your understanding of his injuries were?

12 A. Let's see, where we want to start. Hang on a
13 second because I lost that attachment. I'm a victim of
14 having too many windows open.

15 Q. I already made my technology mistake today,
16 so don't worry.

17 A. So let me get it figure out here.

18 Okay. So I think I got it back here. So
19 the -- his right knee essentially had a tear of his ACL
20 and meniscus. He had a fracture of the top of his
21 tibia. He had a tibial avulsion fracture. And that
22 involves the top of the tibia bone, which is you got
23 two bones below your knee to your foot and the tibia is
24 the bigger one, and it's got a plateau on it where the
25 femur interacts with. And so we had a fracture there.

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1 And he had patellofemoral chondromalacia. And that's
2 just a fancy word for arthritis in his knee joint, the
3 interaction between the back of your kneecap and the
4 bottom of your femur bone at your knee.

5 His lower back injuries, he had a disc -- his
6 main problems were at the bottom two levels of his
7 spine at the L4-L5 and L5-S1 discs in his lower back.
8 He had disc protrusions. He also had annular tears in
9 both these discs in the lower back. And that's
10 significant. You can get -- a majority of people that
11 we see for back issues have mechanical problems with
12 disc bulges or bone spurring or arthritis or what have
13 you. But you also get tears in discs. And tears in
14 discs create chemical issues. Tears in discs usually
15 happen with rotation or, you know, more velocity
16 events. And he had tears in discs, his bottom two
17 levels.

18 Has left foot, he had a fracture of his first
19 metatarsal, his big toe joint. And that has led to him
20 having degenerative disease there. There he had some
21 ligament issues, there in his foot, relating to the
22 accident as well.

23 Q. Do you have any knowledge of any prior
24 injuries, meaning before the wreck, that he had to his
25 right knee, lower back, or left foot?

1 A. No. I didn't see any records about that. I
2 did ask him about that as well. And that's in my
3 report as well that he reported no prior history of
4 significant back pain, knee pain, foot pain.

5 Q. And then you go on to sort of outline some of
6 the medications that he's currently on and some of the
7 previous stuff he's tried. Can you just summarize that
8 for us as well, please?

9 A. Right. At the time of my interview, he was
10 taking allopurinol and he was taking indomethacin.
11 Allopurinol is the medicine used to treat gout.
12 Indomethacin is a nonsteroid anti-inflammatory. It's
13 an older anti-inflammatory. It is used in conjunction
14 with some more severe pain issues. We try not to have
15 patients on it for a long time. It's used a lot in
16 gout. It's also used for pain issues as an
17 anti-inflammatory in pain medication. He's tried other
18 pain medications in the past, other more mainstream
19 anti-inflammatories like Mobic, which is also called
20 meloxicam, naproxen which is known as Aleve. He had
21 tried those. He tried muscle relaxers called baclofen
22 and tizanidine.

23 He thought he might be on one or two others
24 but couldn't remember the names. He's did not -- he's
25 gotten the best benefit with indomethacin. He didn't

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1 recall getting too much benefit from the muscle
2 relaxants. He was real -- as my report says, he was
3 reluctant to rely on medication too much. My personal
4 opinion is that that's been to his detriment because
5 he's significantly functionally limited in many ways.
6 So he was restricting his activity to such a degree
7 that he would -- he's kind of become a bit of a recluse
8 because rather than take the medicine when he's out, he
9 plans his activities to be home a short time later so
10 that he can lay down basically.

11 But those are the medications that he was on
12 at that time. And when I checked with him in February
13 he was still on allopurinol and indomethacin.

14 Q. And I'm curious. You know, you're a pain
15 management physician. Having patients that might be
16 reluctant to take medications, is that something you
17 come across in your practice, you know, often,
18 frequently, ever?

19 A. It really depends on the patient. We're
20 seeing more and more people nowadays that do a lot of
21 research on their ailments and treatments that are
22 available. And they're really interested in this.
23 Certainly, over the past, you know, eight years, six to
24 eight years or so, obviously there's been a huge
25 emphasis on having people not take narcotics for a

1 variety of reasons. And so we don't really use as much
2 of those.

3 I did mention in the report, in the written
4 report but also in the cost projection, I put down
5 medication that I thought he would get benefit from
6 called gabapentin. And I put that on my cost
7 projection, too. It's a great medication. It helped
8 people for many years to treat pain. It's actually a
9 seizure medicine. But in this effort with the
10 insurance companies, the CDCA, and regulations and all
11 about the opioid issues in the country, in this world,
12 I think probably -- I know at least every hospital that
13 I've read notes on or have been associated with started
14 giving gabapentin for surgical pain and sort of not
15 trying to give people opioids after surgery. So it's
16 an evolving art of figuring out what people need for
17 medications. But it's not uncommon to have people like
18 him that are looking for sort of long-term solutions or
19 maybe side effects or stigma perhaps not knowing which
20 medication are habit-forming and which ones aren't.

21 Q. And then up on page 3 of your report, you
22 list out a brief description of his injury or incident.
23 What's your understanding of his mechanism of injury?

24 A. My understanding is that he was, as the
25 report says, he was driving Chevy Astro van. He was

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1 going about 45 miles an hour when a full-size pickup
2 truck kind of crossed over him. My notes say from the
3 right side. Hit him on the right front corner of his
4 vehicle and his vehicle was totaled.

5 Q. And based on review of the medical records
6 and your evaluation of Mr. Kleuchenia, is it your
7 opinion to a reasonable degree of medical certainty,
8 more likely than not, that his injuries to his right
9 knee, left foot, and lower back were caused by that
10 motor vehicle collision?

11 A. Yes, sir.

12 Q. And then on page 4 of your report you get
13 into the treatment history. I know he's had a
14 significant amount of treatment at this point. But
15 could you give us a Cliff notes version of some of the
16 treatment he's had?

17 A. Sure. In terms of his knee, he's had
18 significant physical therapy. He's had surgery on his
19 knee I think around 2019. That was chondroplasty to
20 try to help the arthritis and help those areas. Of
21 course, he had physical therapy after that. He had
22 another knee surgery in 2022 to try to address the
23 fracture for his tibia bone and then started therapy
24 after that -- I'm sorry, physical therapy after that.
25 His foot, he's had injection in his big toe area. That

1 was one of kinda the first things he addressed I think,
2 like, in 2018. Had some physical therapy. He's had an
3 additional steroid injection in that region in 2020.

4 I think what actually -- what we find happens
5 with these issues when -- it's really common that we
6 see people that have a foot injury that ends up
7 impacting the knee or impacting the hip or the lower
8 back because your gait changes. And so these really
9 are not isolated things. And it can go the opposite
10 way, too. If you have a knee problem or if you have a
11 hip problem or a back problem, you know, you start
12 limping, you start changing the way you walk. And that
13 puts stress in new areas onto these joints that are
14 trying to share the whole load of the body.

15 In terms with lower back, he had physical
16 therapy there as well. He's had a couple of steroid
17 injections in his lower back. They were different
18 kinds of injections, you know, epidural injections.
19 There are also joints in the lower back called facet
20 joints. I think he had something there. He had not
21 back surgery yet. That's the only of his three
22 injuries that he's not had back surgery. Although, he
23 has been told by his treating physicians that he will
24 likely need surgery in all three of these areas. The
25 problem that he -- I'm digressing a little bit -- but

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1 the problem that he's gonna be in is at his age he is
2 understandably reluctant to try to jump into surgery
3 because that sets off its own chain reaction of
4 potential problems down the road. But he's been --
5 from my recollection from his treating physicians -- he
6 is a higher candidate to have knee surgery and foot
7 surgery than he is for his lower back. But he is --
8 lower back is not off the table.

9 Q. We talked about earlier there's a hernia
10 issue going on that you're not necessarily addressing.
11 But I'll just ask you: Based on your review of the
12 medical records, did you see any kind of treatment that
13 he had for a hernia?

14 A. I've seen notes mentioning his hernia issue.
15 I've seen notes addressing his urological problems with
16 a floating kidney. He's also had some episodes where
17 he wets the bed at night; on average, maybe once a
18 month. And I've saw some notes from urology addressing
19 that. And just trying to figure out, you know, what
20 the cause of that. I believe that there's -- one of
21 the last notes I saw from his urologist was that they
22 thought that his bedwetting was from his back, from his
23 back injury. But I didn't dive too much into the
24 urological issues or the hernia issues aside from what
25 I was provided from his physicians.

1 Q. And, basically, your review of the medical
2 records, does it appear in your opinion that all the
3 treatment he's received for the left foot, right knee,
4 and lower back is reasonable and medically necessary to
5 this point?

6 A. Yes, sir.

7 Q. And then on page 4 of your report you go on
8 to note some socioeconomic history. Can you just tell
9 us sort of what you're looking at in that regard?

10 A. Yeah. I mean, these questions we're asking
11 are questions that end up being fairly relevant in life
12 care planning. They're areas that a lot of times I
13 don't have the ability to get into -- you know,
14 treating physicians often times don't with this. It's
15 detailed questions. Takes a lot of time to get these.
16 But it's getting an understanding, again, of what life
17 was like before the accident, before these injuries,
18 and what it's like afterwards in trying to just figure
19 out how -- you know, what his daily life is like.

20 And so this section is just getting an idea
21 about his social history. I'd be happy to read through
22 this, the whole thing if you like or not, whatever you
23 like. But suffice it to say that he had some changes
24 to his personality. Sometimes these accidents people
25 will note a change in mental function with

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1 multitasking, brain fog, and that sort of stuff. He
2 did not report that. He was having a good bit of
3 anxiety driving still after this accident when other
4 cars got too close to him or would approach him too
5 quickly. He found himself reflexively pushing the horn
6 or hitting the brake pretty hard if he thought that a
7 car was getting close to him. Certainly a lower bar,
8 so to speak, to panic than he was before the accident.
9 And not trusting people to make the proper decision to
10 get out of his way or to avoid him.

11 He had a lot of problem with sleep. He was
12 getting about -- he estimated -- you know, I didn't put
13 him in a sleep study. You could actually look at him
14 while he was sleeping. But he says he gets about
15 eight hours of sleep, but it was not restful. He was
16 having a nap during the day. He would mention the
17 bedwetting. So just not restful sleep. And then we
18 went into some of his history with his future plans
19 involving transportation in some fashion whether it was
20 transporting automobiles and getting his commercial
21 driver's license or driving as a, you know, kind of
22 like an Uber driver type thing, that he was having
23 trouble doing that.

24 Q. And you just touched on it. But it looks
25 like y'all talked about his employment history a little

1 bit. Did y'all go into detail of what kind of
2 difficulty he was having doing his job?

3 A. A little bit. I didn't, you know, take him
4 outside and say, hey, get in this car, let me see how
5 you can drive. But he's having significant difficulty
6 with a wide range of things that are influenced and
7 necessary for driving. You know, for instance, I think
8 further down in the report he loved to work on cars and
9 that he now couldn't do that. He was having trouble
10 changing a tire, which you certainly get in situations
11 when you're employed in whatever capacity with a
12 vehicle that you're having to address those things in a
13 safe manner. And he felt like he could not work on
14 cars, could not change tires.

15 His foot gives him significant difficulty.
16 You know, he really has to wear sandals because of the
17 foot pain. I believe -- I'm looking through the note
18 now. You know, he had to drive from Myrtle Beach down
19 to see me. And Myrtle Beach, obviously, that drive,
20 depending on what side of Myrtle Beach you're on, could
21 be an hour or could be, you know, two hours. But I
22 recall him saying he had to stop, you know, a few times
23 just on the drive down to Charleston in order to
24 stretch and rest.

25 So I did get ahead of myself a little bit.

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1 Down to functional history I mentioned that he stated
2 that changing a tire on a car is a job that takes him
3 an entire day since this accident, that he can't work
4 on the brakes on his car like he would like to. He was
5 trying to do that to sell a car. But just is having a
6 lot of difficulty with those types of tasks.

7 Q. Do you have an opinion from a physician's
8 standpoint whether or not you think Mr. Kleuchenia
9 could go back and do his job as a cabdriver or car
10 transporter based on his condition?

11 A. I don't think he can, no.

12 Q. And then you touched on it briefly of some of
13 the present pain history. Can you give us an idea of
14 what his pain score was when you saw him, how much pain
15 he's in generally?

16 A. Sure. His pain is and remains more on his
17 right side. His primary pain is in his bilateral lower
18 back and his lumbosacral area, which is the transition
19 area between your lumbar spine and your pelvis. It's
20 70 percent right-sided, 30 percent left-sided. It was
21 a lot worse with standing; a lot worse with cold; a lot
22 worse prolonged sitting, even five or ten minutes. So
23 he states his absolute limit to stand or sitting was
24 about one hour. And that certainly address what we
25 talked about a minute ago about him transporting or

1 driving, just being very limited in how long he can
2 stay in one position before he has a lot of trouble and
3 has to change positions or quit or lay down. It would
4 significantly impact his ability to drive any amounts
5 of distance.

6 So the only reason he was getting relief, the
7 only way he was getting relief, was laying down and
8 putting heat on his back. So the back pain occurs
9 every day. The right knee -- I'm sorry, the pain score
10 when I saw him was a six. Zero being no pain; ten is
11 the worst pain. But the pain ranges from a four to a
12 ten, never gets to a zero. It can get close to that if
13 he's laying down, but he's still having problems pretty
14 much 24 hours a day. His right knee was a lot better
15 after surgeries, but it's much worse when he's going
16 down stairs. So much so that he said that his knee
17 felt unstable going down stairs, which does put him at
18 significant risk of falling if that happens. And,
19 obviously, that would impact him in other ways.

20 So the knee pain could occur daily or only a
21 few times a week just depending on what he's doing.
22 The episodes of the knee pain weren't constant. His
23 back is constant. The knee pain kinda comes and goes
24 based on activity. The left foot, you know, makes it
25 difficult to wear shoes. He has to wear sandals, as I

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1 stated. And the pain tends to be related to wearing
2 tight shoes; if he has to wear tight shoes that it
3 occurs about several hours after wearing tight shoes.
4 So he tries to avoid doing that.

5 Q. There's also a brief mention on page 5 there
6 under his pain assessment about a right -- about having
7 some right shoulder pain. Any idea what's going on
8 with the right shoulder?

9 A. I don't. And, honestly, I know I didn't
10 focus on that. I'm not sure if I -- offhand if I had
11 any mention from treating physicians about it or MRIs
12 or X-rays. I noted that just as a fourth area of pain
13 in case that came up. But I don't have any opinions on
14 that right now.

15 Q. Okay. Fair enough. And moving down, you go
16 over some of his functional history. Can you just
17 kinda tell us -- you've kinda hit on it already -- but
18 what are his general limitations from a functional
19 standpoint?

20 A. Right. Well, the first thing is, the most
21 important thing is he had no functional limitation
22 before this accident. And now he has trouble climbing
23 stairs, has trouble going down stairs. He doesn't
24 really require assistance in terms of someone, you
25 know, standing next to him. But he's relying on

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1 handrails and just physical support to go up and down
2 chairs -- stairs -- sorry. Household chores are a
3 problem. Outdoor yard work are a problem. He really
4 enjoyed having friends over to his house to barbecue
5 and cookout, which he can no longer do because he just
6 can't tolerate the standing and the sitting. As I said
7 before, he has to plan all his activities to be back at
8 home within an hour.

9 He said one of his doctors -- I don't
10 remember who -- had put him on a 20-, 25-pound lifting
11 limit which also would affect his, you know, working,
12 particularly as a car transporter or even as a
13 cabdriver when you're having, you know, get someone's
14 suitcase for them. For instance, where you're having
15 to hook and unhook a trailer. He was a big mechanics
16 guy before his accident. He would work on cars, as I
17 said.

18 He liked to garden. And now he's been
19 limited to where he says he really can't pot more than
20 a couple of plants before having to stop due to pain.
21 Hard to do household chores, and especially the ones
22 that would cause him to have to bend: washing dishes,
23 vacuuming. He states self-care items were not too bad.
24 He could take care of himself. He could shower; he
25 could bathe. He noted having to take extra time

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1 putting shoes on with the bending over to do that. And
2 because of that, the last thing I mentioned was he
3 really -- he's unable to do household chores like
4 cleaning his apartment, which he noted that he hadn't
5 been able to do in over a year.

6 Q. There's also a brief mention in that section
7 about having some bowel issues and diarrhea. Do you
8 recall in the records if those were related to his
9 lower back injury or anything?

10 A. They certainly could be. I did not
11 investigate that with him. When you have back
12 issues -- now, these are usually pretty severe disc
13 problems where you have spinal cord compression and
14 things like discs that can cause bowel and bladder
15 dysfunction. I recall him saying that. I don't recall
16 where I saw that in the records about him
17 having -- changing bowel function. But he has had that
18 to some degree just by evidence of him wetting the bed
19 and seeing urology for so many times and them coming
20 forward and saying, hey, we looked at his -- I believe
21 they probably did bladder studies where you -- you can
22 measure how much urine comes out and these voiding type
23 studies that they did what they do. And they came back
24 and said we can't really find anything mechanical wrong
25 with your bladder. So they surmised that it was from

1 his back.

2 Q. And then it looks like you noted some
3 findings in your physical exam. Can you just kinda go
4 over what your findings were?

5 A. Sure. I noted that he had full range of
6 motion of his lumbar spine and his legs. He had good
7 strength in his legs. A little bit less on his right
8 thigh and hip area, but still pretty strong. He was
9 tender with some muscle spasm in his bilateral
10 lumbosacral junction over his L4-L5 and L5-S1 segments,
11 the facet capsules. He was tender over his bilateral
12 sacroiliac joint and had positive testing there. His
13 straight leg raise test was positive on the right side
14 for buttock pain. His knee had scaring from the
15 surgeries. He had some tenderness, not too bad, on
16 both sides of his left foot. And he was tender over
17 his right shoulder.

18 Q. Okay. And ultimately in the last section
19 here, the impressions, were you able to formulate some
20 opinions to a reasonable degree of medical certainty
21 based on your evaluation and review of all the records?

22 A. Yes. You know, I think I tried to list them
23 in the order that I thought they were bothering him.
24 Certainly, lower back pain, the L4-L5 and the L5-S1
25 disc disruption with annular tears. The sacroiliac

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1 joint pain, lumbar radiculopathy, the right knee
2 issues -- the words there were out of his treating
3 physician's note -- but right patella chondrosis and
4 tibial spin avulsion fracture, partial ACL tear. The
5 meniscus tear is not mentioned there, but that would be
6 included.

7 And then the left foot pain with tendinitis
8 of his flexor hallucis longus, which is the big toe,
9 had an infusion that was fluid in that foot joint.
10 Edema in his ankle and os trigonum, which is an area on
11 the ankle. The rest of them, you know, 6, 7, 8, 9 were
12 things I really didn't address. You know, the flank
13 pain, the overactive bladder, the -- the records
14 certainly support that. The right shoulder pain, yes.
15 The abdominal hernia and the gout symptoms.

16 Q. And then you go on to talk about some of the
17 AMA guides and then put forth some opinions on his
18 disabilities on top of page 7. Could you tell us what
19 you found there?

20 A. Right. Now, it's important that I don't -- I
21 didn't assign him any impairment ratings. I think I
22 might have seen some of his records at some point. But
23 that wasn't my purpose here. This was just -- so that
24 paragraph is not assigning him a disability. It's just
25 recognizing the definition of disability and what I

1 think he's having trouble doing. And so there's four
2 sections to that. It was a decrease of ability to
3 perform or maintain traditional roles with family
4 relationships, with social units. He doesn't really
5 have any family around the area. But relating to his
6 social functions with his friends, he had decreased
7 physical function affecting his vocational capacities
8 and opportunities; decreased ability to perform
9 household services; and then decreased ability to
10 participate in hobbies, pastimes, and interests.

11 Q. And you talked about you weren't assigning
12 any impairment ratings. Do you remember if any of
13 his -- if any of the other physicians had assigned
14 impairment ratings in this case?

15 A. I didn't do it, and I don't know. If someone
16 did, you can reference it for me. But I don't -- I
17 believe I've seen notes of that. I can't remember.

18 Q. No worries. Let me just ask: Do you think
19 his injuries are permanent?

20 A. That ones that I'm capable of addressing,
21 yes.

22 Q. The right knee, left foot, lower back?

23 A. Yes.

24 Q. And then you go on to your recommendations.
25 You put forth those. We'll go through the medical

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1 costs here in a second. But, broadly, just kinda tell
2 us what the recommendations are here.

3 A. The recommendations first, you know, looked
4 at how long -- and this was when this report written.
5 So the time, you know, this accident was 51 months old
6 and that clearly he had not returned to the level of
7 function, activity, tolerance, or comfort that he had
8 prior. And the rest of it, you know, looking at the
9 2012 South Carolina tables, his life expectancy at this
10 time was an additional 37 years. And so then I went
11 through the actual cost projection table to determine
12 the cost for his treatments.

13 Q. Okay. Then you have some costs there listed
14 for, you know, additional treatment on that. And then
15 on the next page, there's some notes. And before we
16 get into the medical cost projection in detail, let me
17 just ask you generally how you're coming up with prices
18 for the different treatment in the cost projection?

19 A. Sure. So these costs are determined a few
20 different ways. If we had the actual cost then I will
21 use those. We try to have a couple of different
22 sources for them if possible. And we will also use
23 online searchable databases. The one that I use is one
24 called Fair Health which is a subscription service
25 where we can enter in the billing codes, which are

1 called CPT codes that are used -- physicians use for
2 all treatments and hospitals use. And we search those
3 codes in a database specific to one's geographical
4 area. So these let us search according to something
5 called a geozip. And so what geozip does is it's a
6 three-digit code which expands a bit wider than a
7 normal zip code.

8 So it incorporates a metropolitan area. You
9 know, congested areas might just have one ZIP code for
10 a geozip. Rural might have three or four counties,
11 three or four ZIP codes all combined into one geozip
12 just to give an idea. It's reflective of the charges
13 for that geographical area for that service. And so we
14 like to have that. That in and of itself does provide
15 more than one cost estimate because that's averaged out
16 over a whole geozip area. If I have actual costs, I
17 will try and incorporate those when they're available.
18 And so that's that first line. I had some actual cost
19 data available for some of his lumbar injections, for
20 his knee and foot injections, for lumbar MRI, for
21 office evaluation of visits. And so when I have that,
22 I average that into the Fair Health data.

23 Prescription drugs are not searchable in that
24 type of database. And so, you know, the GoodRX
25 database is a real common one used for, you know, even

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1 the public to look at stuff. And so I used GoodRX to
2 look for these medications. That is not done by
3 geozip. It's done by specific ZIP code. What I do
4 with that is for his ZIP code I take the two least
5 expensive generic options and the three least expensive
6 brand-name options and average those out. The reason
7 that's done is because my goals as a life care planner
8 or objectives are fourfold. One is to diminish or
9 eliminate physical and psychological pain and
10 suffering. One is to reach and maintain the highest
11 level of function given an individual's unique
12 circumstances. The third one is to prevent
13 complications to which an individual's unique physical
14 and mental conditions predispose them. And then number
15 four is affording the individual the best possible
16 quality life in light of their condition.

17 And so really the only way to do that is to
18 provide them access to brand-name medications. Because
19 as he ages, there will be changes in medications that
20 will be hopefully better; more specific profiles, avoid
21 side effects. And so the GoodRX database lets me do
22 that. Number three says that my Fair Health costs were
23 taken using the 80th percentile. That's the most
24 common percentile you use for life care planners across
25 the country, across all disciplines. It allows us for

1 an individual to get here for a majority of the
2 providers but excluding the most expensive ones.

3 And so I made a stipulation here on number
4 four that I was limited with the left foot where I did
5 not cost out of the cost for a lumber -- I'm sorry, a
6 foot fusion or ankle or foot replacement or shock wave,
7 which sometimes it's a sound wave machine used for foot
8 issues. And then I did not consider his abdominal
9 hernia or his urological issues.

10 Q. And, likewise, in line with the hernia,
11 nothing set forth in the life care plan about any kind
12 of kidney procedure or anything like that, right?

13 A. True.

14 Q. Okay. And then you put forth after this sort
15 of a two-page medical cost projection. Can we go
16 through that, Dr. Joye. Looks like you've done a
17 pretty good job of separating it out in categories
18 here. So if we could just go through the category and
19 the type of service and then maybe just a frequency,
20 duration, and the final amount would be helpful.

21 A. Okay. Which ones do you want again?

22 Q. On the medical cost projection --

23 A. I do, yeah.

24 Q. All right. So we'll just with the physician
25 services at the top. Do you see that first category?

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1 A. Yeah.

2 Q. Just tell us what the treatment is then the
3 frequency and duration that's recommended and then just
4 the final total cost.

5 A. Okay. So the physician services has
6 physician follow-up which are just an office visit.
7 That's usually a 15-, 20-min office visit. The code
8 for that is 99213l. The unit cost is \$186. There is a
9 second page on this. It's just a big spreadsheet with
10 a lot of numbers on it where you can see where I came
11 up with these numbers. The 186 was actually averaged
12 between the actual cost and the database cost. I'm
13 assigning him three visits a year. And his life
14 expectancy being 37 years and the total for that. And
15 under that is the injections.

16 This is difficult to do. He's got so many
17 injuries, and foot and knee and back. And so on the
18 other page of the spreadsheet are the numbers for this.
19 And so the best way I found to do this over the past
20 six years is to kind of list the injections that he
21 would be a candidate for, in my opinion, and average
22 those together. And so in parentheses I say it's the
23 average double lumbar transforaminal epidural, lumbar
24 facet/radio frequency -- that's the RF procedure -- SI
25 joint, knee joint, foot joint, orthobiologics and

1 trigger points. Orthobiologics are not searchable on a
2 database. Orthobiologics is where orthopedics and
3 spine medicine is going with regenerative type
4 procedures with platelets or, you know, even stem cell
5 type procedures to try to help. So that was included
6 there as well.

7 And so my effort here was to cost all of
8 those and say, look, you know, I can't predict that
9 he's going to need this many foot procedures, this
10 many knee procedures a year. So I said let's give him
11 three procedures a year. I don't care whether they're
12 his knee, his foot, his back. We're gonna allow him to
13 get three year. I will say that over the years, I've
14 seen patients just for back issues that have annular
15 tears and disc bulges, and those folks alone may get
16 four to six procedures a year just for one lower back
17 issue. And not to mention him having foot and knee
18 issues that are going to put him at risk of aggravating
19 his back further and vice versa.

20 So three a year for that for 37 years. And
21 the total for the physician component there was
22 \$261,120.84.

23 Q. And that's over his lifetime?

24 A. That's over his lifetime.

25 Q. And then under the routine diagnostics, can

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1 you just tell us what your opinions are there.

2 A. The diagnostics was a lumbar spine MRI. And
3 that was -- the unit cost per year is .25. So
4 basically allowing him to get an MRI of his back every
5 four years up until age 70. We find that, you know,
6 things don't really change too much after 70. And
7 that's an allotment for that. The knee MRI aren't done
8 that often. And that's one every ten years again and
9 up to age 60. So not to age 70. The total for that
10 was \$20,747.94.

11 Q. And I know you've kinda run through the
12 medications earlier. And I think you even addressed
13 the gabapentin recommendation already. Can you just
14 tell us sort of how often he would need that and then
15 the total cost?

16 A. Yes. I did not cost indomethacin. This was
17 a -- I costed a different anti-inflammatory called
18 Mobic or meloxicam. Indomethacin is tough to take
19 consistently for a long period of time. And also I
20 want to make sure these medications -- sometimes I'll
21 switch them because I'm trying to find an
22 anti-inflammatory medication that is available in a
23 brand-name formulation so I can get an approximate
24 brand-name cost at his age to be able to provide
25 him -- to assure him access to proper medical care as

1 he gets older.

2 And so the Mobic was done for that for the
3 rest of his life. And then gabapentin was a medication
4 he's not on. But I think that he -- a couple of
5 things. He warrants a trial of this. You know, he
6 really has no life. You know, his life is revolving
7 around coming home after being out. He needs some help
8 with this. The gabapentin I think might afford him
9 that and afford him the assurance that this is not a
10 habit-forming medication. He won't get addicted to it.
11 The gabapentin is 300 milligrams. The usual dose we
12 put people on is, for adults, is three of those a day.
13 I gave him two of those a day. And then at age 70, I
14 dropped the dose down to pediatric strength which is a
15 hundred milligrams. And that's usually given three
16 times a day as well. I just gave him two of those a
17 day. And, again, that's for his life. The total cost
18 for his medication was \$165,649.30.

19 Q. And just so I understand. That Mobic that
20 you have set forth there, that would replace
21 indomethacin that he's currently taking, correct?

22 A. Yes, sir. Yeah.

23 Q. And then the last is you didn't put forth any
24 costs there. Can you just kinda tell us what -- what
25 that's there for, I guess?

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1 A. Yeah. It's kind of a filler to make me think
2 about it when I put these things together. It's not
3 that often we put laboratory studies on there. You
4 know, people are usually pretty diligent about seeing
5 their primary care doctors and they get lab work done
6 periodically. The only reason I included that on cost
7 projection is if someone is requiring or on opioids,
8 then that would usually open the door to them getting
9 urine drug screens. You know, one time a year, maybe
10 four times a year. And so I put that on there. But
11 he's not on opioids right now. I put TBD on there
12 hoping that he doesn't wind up on opioids. Because if
13 he does then that category is gonna open up.

14 Q. Maybe this is out of your wheelhouse. If it
15 is, just let me know. But if he's got, you know,
16 significant gout issues, do you know if he's gonna need
17 any kind of ongoing urological analysis or anything
18 like that?

19 A. That's checked looking at uric acid levels
20 periodically in the body. I don't know. You know,
21 it's a tangential question. I'm doing a lot in my
22 practice now looking at uric acid for brain health and
23 other issues. But I don't know how often they would
24 check that for him. If you're just checking uric acid
25 levels, it's a fairly inexpensive test. You know, they

1 do it once a year. You know, maybe it's a hundred
2 dollars. I'm not aware of any other blood test they
3 would do looking at gout other than the uric acid.

4 Q. That's fair.

5 A. Although sometimes -- I'm sorry. So
6 sometimes if you have an active flare, they will go
7 into the joint and pull fluid out, send it to the lab
8 to look for crystals and look for how that fluid looks
9 if they have an acute attack.

10 Q. I think that's sort of something I think he's
11 already had going on. I just didn't know if there's
12 maybe ongoing procedures.

13 Under rehabilitation services, just tell us
14 what that section addresses, please.

15 A. Yeah, that's physical therapy or
16 chiropractic. It is very hard when you review these
17 medical records looking at patients who have had
18 physical therapy or chiropractic because the billing is
19 so haphazard with every, you know, little thing thrown
20 in there. You know, every modality, it seems to change
21 visit to visit. So I usually don't use actual costs
22 for physical therapy. There's a pretty good way to
23 search that on this Fair Health database where I can
24 search for his geozip. And for physical therapy, the
25 amount I came up with was \$180 per 15 minutes. Most

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1 physical therapy sessions are 45 minutes. That's where
2 the 540 came from, \$540. I'm giving him eight visits a
3 year for life. And I think there's a pretty good
4 chance he's gonna need a lot more than that. But,
5 again, because we're not sure whether it's gonna be his
6 lower back, his foot, his knee are these collateral
7 issues. But eight visits a year for life is
8 \$159,840.00.

9 I put a TBD on there for vocational
10 counseling just because he's not able to do what he
11 wants to do. He's not able, you know, to work in a
12 capacity that he does. I didn't cost that out. I put
13 that there for me to kind of think about and say, okay,
14 that might open up in the future if he needs something
15 to help him figure out what he can to feel like he's
16 contributing to society and supporting himself.

17 Q. And then you put some appends or a category
18 here about equipment and supplies. Just tell us what
19 that is.

20 A. I did. Lumbar orthosis is a back brace. And
21 that is allowing him one back brace every two years.
22 And a knee brace, the same thing. Replacing that every
23 two years up the age of 60 which was \$20,000.64. We
24 usually replace those every couple of years. You know,
25 those areas of the body just tend to get abused and

1 soiled, sweaty. So that's replacing it every
2 two years.

3 Q. And then it looks like you summarized the
4 services previously listed there as a total of
5 \$627,422.10. And that's before we get into the
6 surgical procedures, correct?

7 A. Yes, sir.

8 Q. And then the surgical procedures here, it's
9 listed under additional treatment, right?

10 A. That's correct.

11 Q. Can we go through those quickly. The
12 surgical procedure for the knee, can you tell us what
13 that is?

14 A. Well, that is -- the knee was for the
15 chondroplasty and --

16 Q. -- repeat of the same surgery he's already
17 had. Is that fair to say?

18 A. That's a repeat of the same procedure that he
19 already had. That was codes taken off there and
20 searched. I did not have actual cost. I was just
21 checking the other spreadsheet I had to see if I had
22 actual cost for his foot or his knee, and I don't. So
23 these are all searched costs. But knee chondroplasty
24 is in large part a repeat of what he had done already,
25 but assuming that they would probably do some things a

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1 little bit differently because it's a repeat procedure.
2 And those are more risky. They have more complication.
3 But I put the same procedure in there allowing him to
4 get one of those with physical therapy. That number,
5 540, came from above for 15 minutes for eight visits of
6 physical therapy. And to get that surgery done one
7 time and that cost is \$48,937.50.

8 Q. Am I correct that the repeat knee
9 chondroplasty procedure noted there, that's a current
10 recommendation by Dr. Nahigian as of right now. Is
11 that accurate?

12 A. It was. That and the foot were currently
13 recommended. But both treating physician, both
14 surgeons, said I think you need this. But they were --
15 they counseled him, you know, that, yeah, I think you
16 need this right now. But, you know, his age is a
17 factor in there. And so they recognize that, you know,
18 it's hard. If he were 10, 15 years older then they'd
19 probably be doing it. But because of his age, they
20 were trying to let him make that decision. But they
21 thought it was needed now.

22 And then the knee replacement, that's the
23 similar way that was done for one knee replacement with
24 physical therapy, a few more physical therapy sessions
25 which is typically needed for knee replacements. And

1 the cost of that is \$187,725.99.

2 Q. Do you have an opinion at what point in his
3 lifetime, you know, to your best estimate he might need
4 the knee replacement?

5 A. So the average life of a knee replacement is
6 about 25 years. And so, clinically, with our patients,
7 you know, we counsel them and say, look, if you can
8 help this, we'd rather not do a knee replacement, you
9 know, up until maybe the age of 60 or 60 -- up to the
10 age of 60, you want to do everything you can to avoid
11 that because you don't want to go back -- you know, I
12 tell patients all day long, you want that new knee to
13 out live you. Because there's complications with
14 replacing a replaced knee, with the cement in the knee
15 and bleeding and infection. And it's just a bigger
16 procedure. And so if you can help it, you don't want
17 to do that but once.

18 And so, you know, you look at life table and
19 figure out how long you're gonna live. And so under
20 the age of 60, you want to do everything you can to it.
21 Maybe 60 to 70 or so might be kind of, you know, middle
22 ground where maybe you might want to do that. But the
23 sweet spot for those tend to be between ages 70 and 80.
24 Although, a lot of the data that we've got now coming
25 in says that we're going to live to 120 years old very

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1 soon. So then what's gonna happen then? But, anyway,
2 certainly not age 37 when this projection was done.
3 You would really not want somebody with a knee
4 replacement at that age.

5 Q. Am I correct that there's some, you know,
6 medical evidence out there that talks about if you had
7 multiple surgeries to the same knee, particularly when
8 you're dealing with, you know, a meniscus issue and all
9 this stuff, that you're at a higher likelihood to need
10 a knee replacement?

11 A. Oh, definitely. You know, any time you
12 have -- I'm an example of that because I fractured my
13 patella ten years ago and had surgery to wire it
14 together. And I know that any time you open that joint
15 up to the air and invade that cavity, that you've set
16 off a cascade. It's gonna increase your likelihood and
17 your risk of getting a knee replacement. So all that
18 trauma, the bleeding in the joint, causes problems
19 opening it up to surgery. All of that increases your
20 risk.

21 Q. And then you know the surgical procedure for
22 the lumbar fusion, could you just explain, you know,
23 that procedure and the cost for that as well, please?

24 A. Right. He's got these two-level disc disease
25 at L4-L5 and L5-S1. He is a candidate to have a lumbar

1 fusion. Even one of his -- not his treating physician,
2 but Dr. Poletti had mentioned a spine surgeon in
3 Mount Pleasant and he mentioned he was a candidate to
4 get a two-level fusion. That's what that code reflects
5 with postoperative physical therapy for that.

6 Sometimes you try to get by with a one-level
7 fusion. But because he has these two tears in his
8 discs, there would be concern that if they did just one
9 level that he'd come back four months later and have
10 the other level be blown out and have to do that. So
11 that's one time -- there's kind of a same situation
12 with that down the road as a knee replacement because
13 there is a medical term for something called adjacent
14 level disease that once you fuse a level of the spine,
15 whether it's the neck or the lower back or the thoracic
16 spine, that you have successfully transitioned the
17 burden of movement of the spine to the joints above and
18 below the fusion. And those break down. It's called
19 adjacent level disease where then you get other levels
20 fused. I believe -- and I'm not sure what the
21 orthopedic and spine literature is -- but the last time
22 I checked, I believe it was a 10 percent risk per year,
23 maybe 6 to 10 percent risk per year of adjacent level
24 disease. So that, likewise, the surgeon notoriously
25 will see people in their 20s and say don't get your

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1 spine fused, push this out as long as you can because
2 of that reason.

3 Q. And in that same note -- I'm sorry. go ahead.

4 A. Go ahead.

5 Q. I was gonna add the same note of sort of
6 outliving some of these procedures, the same issue with
7 the last procedure you have noted in there with the
8 joint replacement to the left foot?

9 A. Yes. Same situation with that. You know,
10 the body is not perfect, but we're pretty doggone
11 perfectly made. And when you start trying to replace
12 things and fuse things, you are removing mechanical
13 advantage of the body. And, in most cases, these
14 things never improve the mechanical advantage of the
15 body; because not only are you replacing a joint, but
16 you're also stretching and moving ligaments and muscles
17 where that affects the joint stability as well. And so
18 the same argument there. And the cost of that
19 procedure for one of those was \$63,512.50.

20 Q. And looking at this medical cost projection
21 as a whole, we noted earlier there's nothing in here
22 for hernia or kidneys or anything like that. Is it
23 your opinion that all the treatment set forth in this
24 medical cost projection is causally related to the
25 injury he had in this motor vehicle accident?

1 A. Yes, sir.

2 Q. And is all the medical treatment set forth in
3 this medical cost projection, in your opinion,
4 reasonably likely to have occurred during
5 Mr. Kleuchenia's lifetime?

6 A. Yes, sir.

7 Q. And, again, there's nothing in there about
8 any hernia or kidney issues or anything like that.
9 You're not addressing those issues. Is that accurate?

10 A. No, I didn't. I mean, if that comes to
11 light, you know, this is -- I know you guys are trying
12 to resolve this thing, you know, fairly soon. But, you
13 know, this projection is a living document. You know,
14 I do change it from time to time if I get new
15 information. If that situation were to change with
16 some concrete decisions and treatment plans, then I
17 would go back and modify this and add that. But right
18 now, I did not.

19 Q. Dr. Joye, have all the opinions you've
20 provided here today been to a reasonable degree of
21 medical certainty?

22 A. Yes, sir.

23 Q. Dr. Joye, that's all the questions I have for
24 you. I appreciate your time in being here today.
25 Thank you.

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1 A. You're welcome. I hope that was helpful.

2 Q. Yes, sir. Thank you.

3 - - - - -

4 EXAMINATION

5 BY MR. BUFFINGTON:

6 Q. Dr. Joye, before you go, I want to ask this
7 question. And it may be inartful, but I think you'll
8 get the point I'm asking. Do you have any opinions as
9 to whether if the surgeries were performed on
10 Mr. Kleuchenia whether that would affect his functional
11 capacity and would it make him become employable again?

12 A. That's a good question. You know, obviously,
13 it requires a crystal ball. In his current capacity in
14 what he wants to do, I think it's more likely than not
15 that that will not be the case. I think this thing has
16 been there for him for, you know, four and a half
17 years, five years. You know, we kind of have a timer
18 in our head when these things happen of wanting to turn
19 things around within about six months to a year. And
20 once they're kind of locked in -- is it possible?
21 Yeah, you know, he could. I just don't think it's very
22 likely. He's got too much debt -- too much collateral
23 issues.

24 There's been a lot of advancements with
25 orthobiologics and platelets to human growth hormone

1 and doing things and getting the body to heal. But,
2 you know, that's a big onion. If he had just isolated
3 back problems, I'd say, yeah, maybe we can figure
4 something out and treat him. But, you know, gosh, he's
5 got the knee and the foot. It would be -- it would
6 require a lot of work and over a long period of time.
7 I don't think it's likely.

8 Q. All right. Thank you.

9 MR. BUFFINGTON: All right.

10 MR. WILLIAMS: Mr. Buffington, I'll must
11 move Exhibit No. 6, which is the life care plan, into
12 evidence, please.

13 MR. BUFFINGTON: Without objection.

14 THE WITNESS: Can I leave?

15 MR. BUFFINGTON: Hold on one second.
16 Without objection, Exhibit No. 6 is admitted into
17 evidence.

18 (Plaintiff's Exhibit No. 6 was received
19 into evidence.)

20 MR. BUFFINGTON: Heather, do you need
21 anything further from Dr. Joye before we let him go?

22 COURT REPORTER: No. I have everything
23 I need. It's all referenced in the exhibits. So I'm
24 good to go.

25 MR. BUFFINGTON: Great. All right.

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1 Thank you, Dr. Joye. You are released from the Zoom.

2 THE WITNESS: Thank you. Appreciate it.

3 MR. BUFFINGTON: It looks like we have

4 Dr. Wood with us.

5 MR. WILLIAMS: Looks like he's here.

6 MR. BUFFINGTON: Can you hear us,

7 Dr. Wood? You're on mute it looks like. He might have
8 stepped away.

9 (Brief pause.)

10 THE WITNESS: Good afternoon, everybody.

11 MR. BUFFINGTON: Good afternoon,

12 Dr. Wood. I'm Bobby Buffington. Good to see you
13 again.

14 THE WITNESS: Same here.

15 MR. BUFFINGTON: I am the special
16 referee in this hearing today. And I believe you are
17 our last witness. Jared, anything we need to discuss
18 before we have Dr. Wood testify?

19 MR. WILLIAMS: No, sir. I think we're
20 ready to go.

21 MR. BUFFINGTON: All right. Then call
22 your next witness.

23 MR. WILLIAMS: Plaintiff calls
24 Dr. Oliver Wood, please.

25 MR. BUFFINGTON: Heather, can you swear

1 him in, please. Thank you.

2 (Whereupon, the witness, DR. OLIVER G.
3 WOOD, JR., was duly sworn.)

4 - - - - -

5 DIRECT EXAMINATION

6 BY MR. WILLIAMS:

7 Q. All right. What's your current address?

8 A. Columbia.

9 Q. Okay. Where are you originally from?

10 A. Greer.

11 Q. All right. How long have you lived in the
12 Greer area?

13 A. I lived there 18 years.

14 Q. Can you give us a rundown of your educational
15 background, please.

16 A. I have Bachelor of Science in business from
17 the University of South Carolina; a master's degree in
18 economics, University of South Carolina; and a PhD in
19 economics from University of Florida.

20 Q. And what is your professional background?

21 A. I was hired by the University of
22 South Carolina to teach economics and banking and
23 finance courses. I taught there for 29 years. I'm now
24 distinguished professor emeritus. Translated, that
25 means I'm retired from teaching.

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1 Q. Did you serve in the military?

2 A. I did. United States Navy on active-duty
3 from 1959 to 1961.

4 Q. What about the Reserves?

5 A. Served in the Naval Reserve from 1961 to 1987
6 when I retired from the Navy.

7 Q. What was your rank in the Naval Reserves?

8 A. Captain.

9 Q. Do you have any practical experience in the
10 business world?

11 A. Yes. I have helped start nine banks and two
12 savings and loan associations. Served on the Board of
13 Directors of Edisto Farm Credit in Orangeburg. We made
14 farm loans in the lower part of the state. Served on
15 the Investment Policy Committee at the AgFirst Bank
16 over on -- well, it used to be on Hampton Street. We
17 set investment policy for all the employees of the
18 AgFirst Bank. Served on the Board of Directors of
19 Republic National Bank until we sold it. Then I went
20 on the advisory board for Lexington State Bank until we
21 merged it with BB&T. And then went on BB&T's advisory
22 board. Then I went on the advisory board for First
23 South and finally the board at Bank Meridian.

24 Q. Do you have any experience in the field of
25 investments?

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1 A. I served on the investment committee at
2 several banks that I was involved with. I taught
3 commercial banking for 27 years; money and capital
4 markets for 27 years. I directed MBA field studies for
5 about 20 years that involved developing a growth plan
6 for a business. I also taught the South Carolina
7 Banker School for 25 years.

8 Q. Have you written any books in the field of
9 economics or finance?

10 A. Yes. I authored or co-authored seven books
11 from a line of grants.

12 Q. And what's your experience in estimating
13 economic loss and personal injury and wrongful death
14 types of cases?

15 A. For the last 55 years, I have served as an
16 expert in cases involving wrongful death, personal
17 injury, employment termination, and business loss cases
18 and reported all the results of my studies.

19 Q. And what experience do you have with
20 instructing lawyers in the area of economic losses?

21 A. From about 1970 to 2004 I was guest lecturer
22 in the damages course at the USC Law School. In 2004
23 the professor retired and went to Charleston to help
24 establish the Charleston School of law. I then moved
25 down there with him, served as a guest lecturer for

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1 several years. And then several years ago they named
2 me their economist in residence.

3 Q. Is the method you use to evaluate economic
4 loss is widely accepted among economists?

5 A. Yes.

6 MR. WILLIAMS: Mr. Buffington, I would
7 offer Dr. Oliver Wood as an economic expert in economic
8 loss with personal injury cases.

9 MR. BUFFINGTON: Yes. I recognize --
10 the Court takes judicial notice that Dr. Wood is
11 well-qualified in those fields.

12 MR. WILLIAMS: Thank you, sir.

13 Q. Dr. Wood, where you hired by my staff to do
14 an economic loss report in this case?

15 A. Yes.

16 Q. And can you tell us what facts you considered
17 in doing your report?

18 A. Here are the facts that I took into account
19 in Mr. Kleuchenia's case:

20 He was born on February 27, 1981. He was
21 injured on July 17th, 2018. On that date he was 37.39
22 years of age. Per South Carolina code, section
23 19-1-150, his life expectancy was an additional 41.16
24 years to his age 78.55 which would incur in the year
25 2059.71. I interviewed Mr. Kleuchenia. According to

1 him, before he was injured, he had no reason to expect
2 less than a normal life expectancy. According to
3 Mr. Kleuchenia, he intended to work to age 70.

4 At the time of his injury, he owned Imperial
5 Cab in Myrtle Beach and he operated this business on a
6 full-time basis. According to Mr. Kleuchenia, in
7 April 2018 he began working on a part-time basis as a
8 freight hauler with AC Shipping out of Newark,
9 New Jersey. According to Mr. Kleuchenia, at the time,
10 he was in process of closing the cab business and
11 preparing to begin working with AC Shipping on a
12 full-time basis. According to an affidavit from
13 Mr. Alexander Yanushko, Y-A-N-U-S-H-K-O, owner of AC
14 Shipping, had Viktor been able to continue to work with
15 me, he would have earned a conservative estimate of
16 \$500 a day less expenses to operate his own vehicle,
17 such as gas, insurance, and repairs. According to
18 Viktor, he estimated his expenses would have been about
19 a hundred dollars per day. So his net income would've
20 been about 400. This equated to about a hundred
21 thousand year. According to Mr. Kleuchenia, since his
22 injury, he has not worked.

23 Cynthia Grimley performed the vocational
24 assessment in this case. She evaluated his
25 after-injury earning capacity. According to

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1 Ms. Grimley, pre-injury earnings profile matched 170 of
2 the most frequently hired for jobs in Horry County, or
3 about 14 percent of the database. According to
4 Ms. Grimley, that is to say he had the capacity to
5 perform or to learn to perform these jobs. According
6 to Ms. Grimley, post-injury with his functional
7 limitations, his profile matched zero of the most
8 frequently hired jobs in Horry County that would have
9 transferability of skills at 60 percent or above.
10 According to Ms. Grimley, this is indicative of a
11 100 percent loss or diminish labor market access based
12 solely upon the job person matching and the data
13 provided.

14 According to Ms. Grimley, there is no pattern
15 of jobs within the labor market that matches
16 functioning to support that he could secure suitable
17 gainful employment with a diligent job search.
18 According to Ms. Grimley, this analysis indicates that
19 Mr. Kleuchenia's functional limitations due to his
20 injury and his limited past work history, the
21 transferable skills analysis yielded zero jobs.
22 According to Ms. Grimley, Mr. Kleuchenia is not able to
23 compete in the labor market because of his functional
24 limitations. This is a permanent condition. It is
25 assumed that a hundred thousand year in 2018 dollars is

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1 a reasonable measure of his before-injury earning
2 capacity. The loss in earning capacity is evaluated
3 beginning in September of 2018 approximately when he
4 would've begun working with AC Shipping on a full-time
5 basis. It is assumed that because of his injuries,
6 he's unemployable.

7 Next, because of his injury, he performed an
8 average of 11 hours a week on personal services. These
9 included cooking, washing dishes, vacuuming, laundry,
10 general household cleaning, grocery shopping, and lawn
11 care. For approximately four months after his injury,
12 he was unable to perform any personal services. Since
13 approximately November 18, 2018, he's been able to
14 perform about three hours. That creates a net loss of
15 eight hours per week. I evaluated those losses in
16 personal services at \$12 an hour. The federal minimum
17 wage is 7.25, but we all know that's out of date. The
18 effective minimum wage in the marketplace is about \$12
19 per hour. Walmart's annual report last year indicated
20 that their average wage was 17.50; and this year they
21 have indicated they are paying up to \$20 per hour. So
22 \$12 an hour is a reasonable estimate of the cost to
23 replacing that.

24 Lastly, I considered Dr. Joye's life care
25 plan and evaluated that.

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1 Q. And, Dr. Wood, based on these facts, do you
2 have an opinion based on a reasonable economic
3 certainty as to the future economic loss to
4 Mr. Kleuchenia?

5 A. Yes.

6 Q. Have you prepared some charts to illustrate
7 that loss?

8 A. Yes.

9 Q. Would you go through those for us, please?

10 A. All right. I assume everyone has my charts.

11 MR. WILLIAMS: Mr. Buffington, these are
12 marked as Plaintiff's Exhibit No. 7 for identification,
13 the documents I gave to you.

14 MR. BUFFINGTON: Yes, sir. I'm looking
15 at that now. Thank you.

16 (Plaintiff's Exhibit No. 7 was marked
17 for identification.)

18 A. All right. Let's look at Chart 1. Chart 1
19 covers the before-trial loss period, and that's from
20 7/18/2018 to 4/8/24, 5.72 years. I used the estimate
21 of his earning capacity as a hundred thousand dollars.
22 I did not give him any cost-of-living or productivity
23 increases in this before-trial period. I assumed it
24 was flat. The total of his loss in earning capacity is
25 \$560,000.

1 Next, his loss in personal services. I broke
2 this down into periods. First, there was a period when
3 he couldn't do anything. That was July 18th to
4 November 17th, 2018. Eleven hours a week, \$1634. He
5 then said he could do three, so he dropped his loss to
6 eight. Loss for the balance of that year is 432. Then
7 the loss from '19, '20, and '21 is \$4,000. In 2022, I
8 increased that to 4800. But because of the
9 practicalities of the marketplace, you have to pay
10 about 12 an hour. That's \$4800 in '22; 48 in '23; 1296
11 in '24. The total loss in personal services, 24,961,
12 making his before-trial loss a loss in earning capacity
13 and personal services, \$584,961.

14 Next, Chart 2. Mr. Kleuchenia has indicated
15 he wanted to work until 70. I took his \$100,000 and
16 increased that at a rate of 3.24 percent per year. The
17 basis for that is that was what the increase was in the
18 US labor markets from 1992 to 2023. That's has been
19 31 years. The average pay increase was 3.24. That's
20 what I used. Interestingly, the CPI during that period
21 was about 2.5. So that means the increase for
22 productivity is the difference or about .7 per year.
23 2.5 for inflation; .7 for productivity. So I increased
24 Mr. Kleuchenia's earning capacity at 3.24 percent and
25 that totals 4,188,849.

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1 However, in our court systems all across
2 America, if money has got to be paid now but it was not
3 due until the future, those future sums have got to be
4 reduced to present value, and I did that. That's in
5 the right column. The total is 2,075,614. I used
6 5 percent compounded annually. The reason I used that
7 is I think it's a reasonable rate for an average person
8 facing commonly available outlets and with average
9 financial knowledge. I think they can get 5 percent.
10 So that's how I discounted his future loss in earning
11 capacity.

12 Turning now to Chart 3. This case has a life
13 care plan. That plan was prepared by Dr. Joye. That
14 means we have to consider money flows in the future. I
15 looked at the consumer price index for medical care
16 items going back to 1960. In 1960 that index was 22.3.
17 I set that equal to \$100 just to make it easy to
18 comprehend. And then copied that increase in medical
19 care items from 1960 to 2023. That's a period of
20 63 years. What cost a hundred dollars in 1960 costs
21 1,169 in 2000; 1,742 in 2010; 2,327 in 2020; and 2,462
22 in 2023. That's an inflation rate of about 6.4 percent
23 per year compounded for 63 years. Relentless. That
24 gives you some background on inflation.

25 Turning to Chart 4, within that general

1 medical index are a number of subcategories that apply
2 to this life care plan. Turning to Chart 4, at the top
3 I've put the general CPI for reference, 2.53. The
4 general medical CPI, 5.48. Now, within the general
5 medical, we've got a subcategory for professional
6 services -- that means doctors' visits -- 2.84;
7 physician services, 2.69. I like to point out that
8 those two numbers are relatively close because doctors
9 are pretty good economists. They match up -- they mark
10 up their fees about in line with their professional
11 services.

12 Now, there's a category called medical care
13 commodities, 2.5; other medical professionals, 2.2.
14 They need a new economist. And, finally, there's
15 prescription medications. We're all familiar with the
16 inflation of prescription drugs. That's 3.08. These
17 are the inflation rates I used to adjust Dr. Joye's
18 life care plan.

19 Now, turning to Chart 5, here is the life
20 care plan reduced to one page. Since Dr. Joye just
21 testified, I'll just mention the main categories.
22 Physician services -- by the way, a life care plan has
23 four dimensions: the element itself, that's column one;
24 two, the frequency, how often do you need it; three,
25 your periodic or annual costs; and four, the duration.

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1 Those are the dimensions of a life care plan. So I
2 brought that into one page. And as you can see, the
3 main categories are physician services, routine
4 diagnostics, medications. Laboratory studies, that's a
5 TBD. We don't know what it is, so it wasn't evaluated.
6 Rehabilitation services, one of those is a TBD also and
7 that's vocational counseling. And, finally, there's
8 some additional treatments, several of which are just
9 required one time. By the way, the last one, the foot
10 procedure, at the end of life, I just took that to his
11 life expectancy and didn't value it on a 2024 basis.

12 Okay. Taking those elements in the life care
13 plan, turn to Chart 6. Here are all of Dr. Joye's
14 elements adjusted for inflation and reduced to present
15 value at a rate of 5 percent compounded annually. When
16 you total all those, you get 799,101. That is the
17 present value of funding Dr. Joye's life care plan.
18 Now, we've got this divided as he did into categories.
19 If you think some category is not needed, then take the
20 amount to the right and subtract it from the bottom.
21 If you think twice as much is needed, you can double
22 that and add it to the bottom. So it's a flexible
23 chart if adjustments need to be made, you want to take
24 something out or add something to it. Bottom line is
25 799,101.

1 Next, turn to Chart 7. This is the
2 after-trial loss. First, is the loss in earning
3 capacity, 2,075,614. That's the present value of
4 replacing his loss in earning capacity. Personal
5 services, 106,582. That's the present value of
6 replacing family services. And, lastly, future medical
7 care costs, 799,101. Totaling those after-trial
8 elements, you get 2,981,297. That's the present value
9 of the after-trial loss.

10 Lastly, Chart number 8. This is the total
11 financial loss. Here we take the before-trial loss,
12 584,961, add it to the after-trial loss, 2,981,297.
13 And the total is 3,566,259. That is the present value
14 of Mr. Kleuchenia's economic loss today.

15 Q. Dr. Wood, does that number include anything
16 for the past medical expenses that have been occurred?

17 A. No. Medical expenses tend to accumulate from
18 the time of the injury to the trial date. And that's
19 usually compiled by the attorney. So I don't have that
20 and it's not included.

21 Q. Does that number include any kind of
22 noneconomic losses like pain and suffering, loss of
23 enjoyment of life, anything like that?

24 A. No. Those items are non-economic as you
25 indicated, and I don't evaluate pain and suffering,

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1 loss of enjoyment of life, or any of these items.

2 That's outside of the economic loss.

3 Q. Dr. Wood. That's all the questions I have
4 for you. I appreciate your time here today. Thank you
5 very, very much.

6 A. Thank you, everybody. Have a good afternoon.

7 MR. BUFFINGTON: Thank you, Dr. Wood.

8 Always good to see you.

9 THE WITNESS: Same here, sir. Have a
10 good one.

11 MR. BUFFINGTON: Yes, sir. And we can
12 dismiss you from hearing. Thanks.

13 THE WITNESS: Thank you very much.

14 MR. WILLIAMS: Mr. Buffington, I'll move
15 Exhibit No. 7 into evidence just for the record.

16 MR. BUFFINGTON: All right. Exhibit
17 No. 7 is admitted into evidence.

18 (Plaintiff's Exhibit No. 7 was received
19 into evidence.)

20 MR. BUFFINGTON: Do we need a break,
21 Jared, or are you ready --

22 MR. WILLIAMS: I'll need at least a
23 restroom break if that's okay.

24 MR. BUFFINGTON: Let's do that. Let's
25 take a 10-minute break. We'll be back at 1:48 and we

1 can wrap it up with the closing.

2 MR. WILLIAMS: Sounds good.

3 (Short break from 1:38 p.m. until
4 1:48 p.m.)

5 MR. BUFFINGTON: So that was the
6 testimony of Dr. Wood. Anymore witnesses?

7 MR. WILLIAMS: No, sir. That's it. The
8 Plaintiff rests.

9 MR. BUFFINGTON: Well, you're welcome --
10 I mean, we've -- you're welcome to give a closing
11 statement to the extent you want to, Jared. I know
12 you'll be submitting a proposed order. So it doesn't
13 need to be lengthy, I don't think.

14 MR. WILLIAMS: No. I'll submit sort of
15 after I get the transcript the findings of facts
16 and stuff for you, as you will. I've got maybe a
17 five-minute just kinda summary I want to gather. But
18 I'm not gonna go back through all the evidence or
19 anything like that. It's been admitted and testified
20 to.

21 MR. BUFFINGTON: Yes, sir. All right.
22 Go ahead, proceed. Thanks.

23 MR. WILLIAMS: Thanks, Mr. Buffington.
24 You know, if look back at the pretrial brief where I
25 tried to sort of outline the damages, I kind of

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1 approached it from two categories, right, two separate
2 buckets I guess you could say. You've got the economic
3 bucket and you've got the noneconomic bucket, right,
4 when we're talking about actual damages because we're
5 not seeking any kind of punitives or anything in this
6 case. But when you look at actual damages, there's two
7 categories, the economics and the non-economics. And
8 so that's kind of how I approached the damages issue.

9 The economic damages are the economic
10 damages. It is what it is at this point. They've been
11 testified to. You know, it's admitted into evidence.
12 And I'll briefly kinda summarize what we have. But as
13 far as the medical records go, they've been admitted
14 into evidence as Exhibit No. 4. I don't think there's
15 any denying that he's had a significant -- you know,
16 he's got significant injuries. He has a number of
17 injuries. I mean, he's got permanent injuries. I try
18 to go through the medicals myself and kind of get an
19 accounting of some of the big picture items. And quite
20 honestly, it was difficult to do. I can tell you that
21 he's had over a 100 office visits. Or excuse me, over
22 80 office visits with various doctors since the date of
23 the accident. He's had over a hundred physical therapy
24 sessions. He's had numerous injections to various body
25 parts. He's undergone three surgeries to date, two on

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1 the right knee and one for the hernia. As he sits here
2 today, he needs two more surgeries that have already
3 been recommended, one for the right knee and one for
4 the left foot.

5 And then we have two other physicians,
6 Dr. Poletti and Dr. Cook, both saying at some point
7 he's gonna need a two-level fusion for his back. In
8 total, if everything goes according to plan, which in
9 the medical world, you know how that is, I mean, he's
10 looking at a total of seven surgeries he's gonna need
11 over the course of his lifetime. That's not including
12 anything for the kidney or anything like that. That's
13 not addressed here.

14 Past medical bills are \$116,874.19. The
15 future medical has been testified to by Dr. Joye.
16 Likewise, it's supported by many of the opinions of the
17 treating physicians. We've got Dr. Joye's life care
18 plan admitted into evidence as Exhibit No. 6. And you
19 heard Dr. Wood testify to the present value, \$799,101.
20 I would submit to you that the life care plan is a
21 conservative estimate. I mean, it doesn't include
22 anything for the kidneys. It doesn't include any kind
23 of lab studies. It doesn't include any kind of
24 vocational rehabilitation or anything like that.

25 The lost wages have been testified to

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1 through Ms. Grimley, her opinions as an vocational
2 evaluation. And that's admitted into evidence as
3 Exhibit No. 5. According to Ms. Grimley,
4 Mr. Kleuchenia has suffered a 100 percent loss of
5 employability, competitive labor market. You've also
6 heard that the loss wages are calculated on a standing
7 job offer that Mr. Kleuchenia had with an estimated
8 annual wages of a hundred thousand dollars a year.
9 Again, I'll submit that that's a conservative estimate
10 based on some just simple math that Ms. Grimley did.
11 And really his gross wages would be more at, at a
12 conservative estimate, 125,000 year. You heard
13 Dr. Wood testify to the total amount of lost wages and
14 future lost earnings and present value, both pre-trial
15 and post-trial, a total of \$2,635,614.

16 There's been substantial evidence on the
17 loss of personal services both through Mr. Kleuchenia's
18 own testimony and through Dr. Joye. His inability to
19 do basic household chores, clean his house, work in the
20 yard. Dr. Wood has calculated his loss of personal
21 services on a loss of eight hours a week, which assumes
22 that he's still doing three hours a week of personal
23 chores. Which, again, I think is conservative. And
24 the amount of present value is \$131,544. So combining
25 all that together, you got total economic damages, past

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1 and future medical, lost earnings, personal services,
2 \$3,000,683; one-hundred six million -- sorry, let me
3 rephrase that -- \$3,683,133.19. So that's the economic
4 portion. That's the one side of the case. All of
5 those economic damages are supported by a preponderance
6 of the evidence. They're supported by expert opinion.
7 They're supported by expert testimony. And in this
8 particular case, Mr. Buffington, they're undisputed in
9 this case. So the economics are what the economics
10 are, so.

11 And then I'll get into the other bucket,
12 so to speak, the other aspect of the damages, and
13 that's the non-economics. In my opinion, this is the
14 more significant portion of the claim. It's the most
15 upsetting part. It's the most, you know, distressing
16 part based on Mr. Kleuchenia's condition. You can look
17 at the medical records themselves. And, you know,
18 particularly, I'll point you to Dr. Cook's medical
19 notes from January 30th of 2019 and July 31st of 2019
20 that address issues with his activities of daily
21 living. It talks about his inability to sit, stand,
22 walk, and drive for any significant portion of time.
23 And I think anytime you have those issues addressed in
24 the medical records themselves, that doesn't happen too
25 often aside from some kind of IME issue. You've heard

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1 about that permanent impairment rating. We've got a
2 10 percent impairment rating assigned to the right
3 lower extremity by Dr. Nahigian. And then a 20 percent
4 whole person to the lower back by Dr. Poletti. Nothing
5 has been addressed permanent impairment-wise for the
6 left foot simply because he still needs medical
7 treatment. But I think we can all agree, he's gonna
8 have some type of permanent impairment on that left
9 foot.

10 You've heard the FCE places him into a
11 limited sedentary, limited light-duty category of
12 employment. And then we've heard Mr. Kleuchenia's
13 testimony here today, you know, talking about his
14 issues working, his inability to be upright for any
15 given portion of time. Sounds like an hour, an hour
16 and a half at most is about what he gets before he's
17 got to lay down. Doesn't really have much of a social
18 life at this point. You know, he doesn't go out, hang
19 out with friends or anything. I can't get him to go
20 see a movie with me. He can't be out long enough to
21 sit and see a movie. So, clearly, he's limited from a
22 physical standpoint. And, clearly, his social life and
23 just overall enjoyment of the life he lives is greatly
24 affected because of his injuries.

25 You know, in total -- you know, you just

1 break it down, it sounds like most of Mr. Kleuchenia's
2 day is spent in bed and, you know, restrained to a bed.
3 And I think that's pretty accurate on what he's doing
4 on a daily basis. He's not out doing anything. He's
5 not driving anywhere long distance. And it's not by
6 choice. So, you know, take that into consideration.
7 Likewise, I think the other thing that needs to be
8 considered is his age. And it's been talked about by a
9 number of the witnesses. At the time of the accident
10 he was 37 years old giving him a life expectancy of
11 43 years. That's a long time to be dealing with these
12 issues and living the kind of life he's living right
13 now. You know, you can hope and pray that maybe some
14 medical procedure will fix that, but that's not what
15 the testimony supports that's been presented here
16 today.

17 You heard him talk about his dating
18 life. You know, he doesn't have much of a dating life
19 since this accident. His goals of getting married and,
20 you know, having children really aren't goals anymore.
21 You also heard about the fact that he hasn't been back
22 overseas to see his family in seven years because of
23 this accident. You know, all of that stuff affected
24 simply because of, you know, the condition he's in and
25 the type of limitations he has. And so, overall, you

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1 know, you're asked to put a number on that, right. And
2 we know that when you're looking at the non-economic
3 types of damages, there's no tangible thing you can
4 really look at. There's no law book to go look at, you
5 know, you can look up the value of this type of injury
6 from a non-economic standpoint. There's nothing like
7 that, right.

8 What I would tell you, though, is if
9 we're trying to grasp at some tangible thing to put a
10 value on the non-economic damages, what I would tell is
11 you can start with economic portion of the claim. To
12 me, that's the minimum. That's the lowest point of
13 what the non-economic value should have. For every,
14 you know, medical bill that's incurred, for every lost
15 wage that's incurred, there's a correlating physical or
16 emotional feeling that goes with that. What's Newton's
17 third law, for every reaction, there's an equal or
18 opposite reaction. You know, for every, you know,
19 economic loss that gets incurred, there's a feeling and
20 a human standpoint that goes with that economic loss.
21 So in my opinion, the economic portion of the claim
22 could be looked at that way. But I would propose
23 that's the minimum; that's the floor. I personally
24 believe that the non-economic damages in these type
25 cases -- what a person feels and goes through and

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1 experiences -- should have more value than a medical
2 bill or a pay stub. That's just my opinion. I
3 understand that my opinion doesn't matter. I'm not
4 making this decision. The only opinion that does
5 matter is yours, Mr. Buffington.

6 So I know you've got a hard decision to
7 make. What I could tell you is, you know,
8 Mr. Kleuchenia was offered some amount of money, you
9 know, between having, you know, these issues or, you
10 know having his health, he's gonna choose health,
11 right. There's no amount of money you can put on
12 somebody's health. You only get one life, you only get
13 one body. So, you know, you're overall health in the
14 way you live your life is an invaluable thing. But,
15 unfortunately, I understand the law makes us put a
16 value on it. That's just with the law says.

17 And we'll live by whatever your decision
18 is. So I understand you got a tough decision to make
19 on behalf of myself, on behalf of Mr. Kleuchenia.

20 Thank you for your time and care in this case.

21 Ms. Landry, thank you for your time here today. You
22 know, I'll get us out of here with that. There might
23 be some post stuff, trial stuff we need to address,
24 Mr. Buffington. But that's really all I have in
25 closing.

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1 MR. BUFFINGTON: All right. Thank you.
2 So a couple of things. One is -- and I addressed this
3 briefly -- I know I saw from the court file you had
4 sent notice to the UIM carrier and you filed that
5 notice. So I'm not gonna make it exhibit here. It's
6 already filed with the Court. But it appears that
7 you've properly served them with notice of this
8 hearing.

9 MR. WILLIAMS: Yes, sir.

10 MR. BUFFINGTON: And, obviously, they
11 are not here. They didn't -- I don't think the notice
12 had a Zoom -- had the Zoom link in it. But they
13 certainly --

14 MR. WILLIAMS: It did not. It had my
15 information, though.

16 MR. BUFFINGTON: You didn't hear from
17 them between the time you submitted that?

18 MR. WILLIAMS: No, sir.

19 MR. BUFFINGTON: All right. And then so
20 what I would -- you certainly take the time you need to
21 get me a proposed order. If you would just send it to
22 me in Word format.

23 MR. WILLIAMS: I will.

24 MR. BUFFINGTON: And I can review it.

25 MR. WILLIAMS: I'll send it to you with

1 the transcript as well. So you'll have a copy of the
2 transcript.

3 MR. BUFFINGTON: Great. And, yes, if
4 you would also, for that transcript, I don't need a
5 printed copy. If you can put that in a link.

6 MR. WILLIAMS: Yeah. No worries. The
7 other thing I want to ask is I'll have a motion for
8 cost. I would assume you'll be addressing that as
9 well?

10 MR. BUFFINGTON: Yes. In fact, if you
11 want to include that in your proposed order, I don't --
12 well, I guess you do need to make a formal motion for
13 that. I just don't want to drag it out too much.

14 MR. WILLIAMS: No. What I would propose
15 is maybe -- well, you're right. Yeah, ten days after
16 you file the actual findings and conclusions.

17 MR. BUFFINGTON: Okay. Yes, that's
18 fine. Yes. And when you file that motion, if you'll
19 file a proposed order with that as well and that will
20 cut through -- obviously, we got to give I guess --
21 because that's something you'll need to serve on the
22 UIM carrier as well. We'll give them some time --
23 notice, time to respond to that. But there's no need
24 to file the motion and then do a proposed order. If
25 you'll just submit a proposed order with that.

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1 MR. WILLIAMS: That works.

2 MR. BUFFINGTON: All right. Good.

3 Heather, anything else you need from us?

4 COURT REPORTER: Nope. I don't need
5 anything. I don't have any questions.

6 MR. BUFFINGTON: All right. And so the
7 exhibits, I've got your exhibit notebook. Are we
8 considering those the original or are you holding the
9 original?

10 MR. WILLIAMS: I've got copies, and
11 you've got copies. If you don't want the
12 responsibility, I can hold them. I'm gonna compile
13 like an exhibit list with the Court and I'll just put a
14 note in there. If you want to hold them or if I want
15 to hold them, you let me know, Mr. Buffington.

16 MR. BUFFINGTON: If you'll hold onto
17 them, that will be easier.

18 MR. WILLIAMS: Sure. Sounds good.

19 MR. BUFFINGTON: All right.

20 Mr. Kleuchenia, thank you for being here. Sorry you
21 were in this accident. And we will issue a ruling as
22 promptly as we can.

23 MR. WILLIAMS: Thank you, everybody.

24 MR. KLEUCHENIA: Thank you for your
25 time.

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1 MR. BUFFINGTON: You're welcome.
2 (The hearing concluded at 2:03 p.m.)
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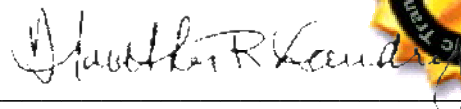
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C E R T I F I C A T E
STATE OF SOUTH CAROLINA;
COUNTY OF COLLETON

I, HEATHER R. LANDRY, Certified Verbatim Reporter and Notary Public, State of South Carolina at Large, certify that I was authorized to and did stenographically report (by voice) the foregoing hearing of the captioned case, Viktor Kleuchenia v. Brian McLeod; that all witnesses were sworn by me or administered an oath of affirmation to testify the truth; and that the transcript represents a true, accurate, and complete record of the testimony so given to the best of my skill and ability.

I further certify that I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor have any interest in the outcome of this action.

WITNESS MY HAND AND OFFICIAL SEAL this 21st day of April, 2024, in the County of Colleton, of South Carolina.



Heather R. Landry, CVR
and Notary Public
My Commission Expires:
March 19, 2034

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	CASE NO.: 2021-CP- 26-04596
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MOTION FOR COSTS
v.	)	AND INTEREST
	)	
BRIAN MCLEOD,	)	
	)	
Defendant.	)	

Pursuant to Rules 54 and 68 of the South Carolina Rules of Civil Procedure, together with S.C. Code § 15-35- 400, Plaintiff hereby moves for an order to tax costs and to award Plaintiff the interest and costs owed for failing to accept Plaintiff's Offer of Judgment to resolve this case.

On August 17, 2023, Plaintiff filed an Offer of Judgment pursuant to Rule 68, *SCRCP*, for \$50,000.00. The Offer of Judgment was not accepted. The Court entered its *Order of Judgment for Damages* on June 4, 2024, awarding Plaintiff a net judgment of \$2,250,000.00. Pursuant to Rule 54(d), Plaintiff is entitled to "taxable costs" by virtue of being the prevailing party. Further, because the judgment is greater than the Offer of Judgment, Plaintiff is entitled to additional costs and interest pursuant to Rule 68(b), *SCRCP*, and S.C. Code § 15-35- 400.

A) Costs

Rule 54 allows for specifically enumerated costs and disbursements to the prevailing party.

Plaintiff seeks the following costs under Rule 54:

(a)	Fees of the Clerk:	\$180.32
	(Rule 54(d)(1), <i>SCRCP</i>)	
	Summons and Complaint	
	Motions for Summary Judgment	
	Motion for Special Referee	

(b)	Fees incurred in Service of Process: (Rule 54(d)(4), <i>SCRCP</i>)	\$85.00
(c)	Fees for Exemplification and Copies of Papers Necessarily Obtained for Trial: (Rule 54(e)(6), <i>SCRCP</i>) Copy of Exhibits 1-7	\$255.99

In addition to the costs taxable under Rule 54, *SCRCP*, Plaintiff is entitled to reimbursement for additional costs incurred for failing to accept the Offer of Judgment. Rule 68(b), *SCRCP*, provides that Plaintiff is broadly entitled to “any administrative, filing, or other court costs from the date of the offer until the entry of the judgment.” Unlike Rule 54(e), which sets forth the “taxable costs” allowed under the rule, Rule 68(b) permits costs for “any administrative, filing, or other court costs” from the date of the offer of judgment. *Id.* Rule 68 does not limit or restrict costs allowed to those set forth in Rule 54(e), nor has any South Carolina decision limited the costs allowed under Rule 68(b) to only costs that are allowed under Rule 54(e). Since the date the Offer of Judgment was filed, Plaintiff has incurred the following case costs beyond those noted above under Rule 54:

(a)	Trial Testimony of Cynthia Grimley:	\$2,6550.00
(b)	Trial Testimony of Dr. Todd Joye, M.D.:	\$4,962.50
(c)	Trial Testimony of Dr. Oliver Wood, Jr., PhD:	\$3,387.50
(d)	Court Reporter charges for Trial:	\$1,339.95
(e)	Special Referee Charges:	\$3,120.00

Plaintiff would not have incurred these costs if his Offer of Judgment had been accepted.

As recognized by our courts, the intention of Rule 68 is “to encourage settlements and avoid protracted litigation,” which results in hefty litigation costs. *Black v. Roche Biomedical Laboratories*, 315 S.C. 223, 227, 433 S.E.2d 21, 24 (Ct. App. 1993). Therefore, it is fitting that

Plaintiff should be reimbursed for the administrative and court costs necessarily incurred to continue in litigation and present this case to the special referee. Indeed, to require Plaintiff to bear these litigation costs would defy both the letter and the spirit of the law set forth in Rule 68(b) and in S.C. Code § 15-35- 400. Therefore, Plaintiff requests an order for costs in the amount of **\$15,986.26** pursuant to Rules 54 and 68, *SCRCP*. Counsel for the Plaintiff certifies in the attached affidavit that the above costs are correct and were necessarily incurred in this litigation. (*See* Exhibit A).

B) Offer of Judgment Interest

In addition to the costs enumerated above, Plaintiff is entitled to eight percent (8%) interest on the amount of the award from the date the Offer of judgment was filed (August 17, 2023) until the date judgment was entered (June 4, 2024). Both Rule 68(b), *SCRCP*, and S.C. Code § 15-35-400 specifically state the plaintiff is entitled to eight percent (8%) interest “on the amount of the verdict or award” from the date of the offer to the entry of judgment whenever the defendant does not accept the offer of judgment and the verdict is more favorable to the plaintiff than the offer made.¹ Specifically, Rule 68(b), *SCRCP*, provides in relevant part:

If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror ***shall*** recover from the offeree: . . . (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of judgment

Id. (emphasis added). Similarly, section 15-35-400(B) states:

If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror ***shall*** be allowed to recover from the offeree: . . . (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer

¹ The “or determination” and “or award” language in both the rule and the statute would apply to bench trials.

Id. (emphasis added). *See also Garrison v. Target Corp.*, 435 S.C. 566, 586, 869 S.E.2d 797, 808 (2022) (“We find the language of both the rule and the statute clearly and unambiguously provide that [the plaintiff] is entitled to eight percent interest on the entire amount of the verdict.”) Therefore, Plaintiff is entitled to an award of interest of **\$143,506.85**, which represents eight percent (8%) annual interest on \$2,250,000.00 over 291 days.²

Just as was the case with the award of costs, it would be contrary to the purpose of the rule and statute to refuse the plaintiff offer of judgment interest in this case. “[T]he award of interest under an offer of judgment statute serves the purpose of promoting fair and reasonable compromise of litigation without trial.” *Garrison*, 435 S.C. at 587, 869 S.E.2d at 809 (internal quotation marks omitted). This purpose is no less important simply because a Plaintiff is pursuing UIM benefits where the carrier has failed to appear. Therefore, Rule 68(b) and S.C. Code § 15-35-400(B) must be administered in this context like every other. *Id.* (Rule 68 and the statute both use the word “shall” in awarding costs and interests indicating the right is not discretionary.).

CONCLUSION

For all the reasons stated herein and based on the affidavit certifying costs attached hereto, Plaintiff respectfully requests that the court award a total of \$15,986.26 in costs pursuant to Rule 54(d) and (e), and Rule 68(b), *SCRCP*, as well as \$143,506.65 in offer of judgment interest pursuant to Rule 68(b), *SCRCP*, and S.C. Code § 15-35- 400(B).

Final judgment amount to be entered totaling **\$2,409,493.11**, with interest to begin accruing upon entry.

[signature block on the following page]

² This period is calculated between August 18, 2023, (the day after the Offer of Judgment was filed) through June 3, 2024, (the day before the *Order of Judgment on Damages* was entered by the Court).

Respectfully submitted,

s/Jared C. Williams
jared@williamslawsc.com

S.C. Bar No. 100806

P.O. Box 403

Mt. Pleasant, SC 29465

(843) 991-6528 – Office

(803) 429-3393 – Direct

Attorney for Plaintiff

June 5, 2024
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	CASE NO.: 2021-CP- 26-04596
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	ATTORNEY AFFIDAVIT OF
v.	)	JARED C. WILLIAMS, ESQ.
	)	
BRIAN MCLEOD,	)	
	)	
Defendant.	)	

PERSONALLY APPEARED BEFORE ME, the undersigned, who first being duly sworn,
deposes and states that:

1. I am an attorney who presents the Plaintiff in the above-referenced personal injury matter pending in Horry County Court of Common Pleas.

2. During the course of litigating this matter, I have incurred the following expenses in prosecuting this claim on behalf of Plaintiff:

• Fees of the Clerk:	\$180.32
• Fees Incurred in Service of Process:	\$85.00
• Fees for Exemplification and Copies of Papers Necessarily Obtained for Trial:	\$255.99

3. On August 17, 2023, I filed an Offer of Judgment with the Court in the amount of \$50,000.00, which was not accepted.

4. After the filing of the Offer of Judgment, I have incurred the following expenses in prosecuting this claim on behalf of Plaintiff:

• Trial Testimony of Cynthia Grimley:	\$2,655.00
• Trial Testimony of Dr. Todd Joye, M.D.:	\$4,962.50
• Trial Testimony of Dr. Oliver Wood, Jr., PhD:	\$3,387.50
• Court Reporter Charges for Trial:	\$1,339.95
• Special Referee Charges:	\$3,120.00

5. To the best of my knowledge, the costs set forth are accurate and have been necessary for the prosecution of this claim on behalf of Plaintiff.

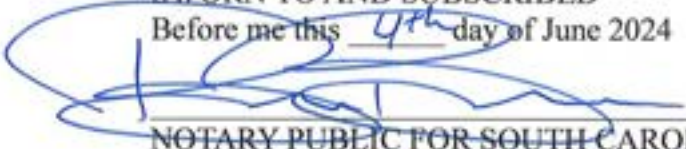
FURTHER AFFIANT SAYETH NOT.


Jared C. Williams, Esquire
SC Bar No.: 100806
P.O. Box 403
Mount Pleasant, SC 29465
(843) 991-6528 – Telephone
(803) 429-3393
Attorney for Plaintiff

Date: 6/4/24

SWORN TO AND SUBSCRIBED

Before me this 4th day of June 2024


NOTARY PUBLIC FOR SOUTH CAROLINA

Printed Name: BIANCA BRAMBLE

My commission expires: 5-15-2033

BIANCA A BRAMBLE
Notary Public, State of South Carolina
My Commission Expires MAY 15, 2033

Certificate of Electronic Notification

Recipients

Robert Buffington - Notification transmitted on 06-05-2024 09:59:14 AM.

G. Smith - Notification transmitted on 06-05-2024 09:59:14 AM.

Jared Williams - Notification transmitted on 06-05-2024 09:59:14 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2021CP2604596

Official File Stamp: 06-05-2024 09:58:15 AM

Court: CIRCUIT COURT

Common Pleas

Horry

Case Caption: Viktor Kleuchenia VS Brian McLeod

Document(s) Submitted: Motion/Costs

- Exhibit/Filing of Exhibits

Filed by or on behalf of: Jared Cyle Williams

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

G. Michael Smith, Sr. for Brian McLeod

Jared Cyle Williams for Viktor Kleuchenia

Robert Walton Buffington

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Viktar Kleuchenia,

PLAINTIFF,

v.

Brian McCleod,

DEFENDANT.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2021-CP-26-04596

**Texas Insurance Company, as successor
to Onyx Insurance Company, an
Underinsured Motorist Carrier's Motion
to Vacate Judgment**

TO: JARED WILLIAMS, ATTORNEY FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that, pursuant to Rule 60 of the South Carolina Rules of Civil Procedure, Texas Insurance Company, as successor to Onyx Insurance Company, an underinsured motorist carrier, (hereinafter "Texas Insurance") will move before the Presiding Judge of the Court of Common Pleas for the Fifteenth Judicial Circuit, Horry County, at such time as the Court may designate, for an order setting aside the award by the Special Referee on July 2, 2024, of costs and interest on the grounds that the Plaintiff's Offer of Judgment was never served on, and no notice of hearing was ever given to Texas Insurance.

Accordingly, Texas Insurance respectfully requests an order vacating the award of costs and interest in this matter.

GRIFFITH, FREEMAN & LIIPFERT, LLC

By: s/Michael D. Freeman
Michael D. Freeman (SC Bar #71260)
600 Monson Street
PO Drawer 570
Beaufort, SC 29901
843-521-4242
843-521-4247 (fax)
mfreeman@griffithfreeman.com

ATTORNEYS FOR TEXAS INSURANCE
COMPANY, as successor to ONYX
INSURANCE COMPANY, an underinsured
motorist carrier.

September 17, 2024
Beaufort, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	
	)	CASE NO.: 2021-CP-26-04596
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION TO TEXAS INSURANCE
vs.	)	COMPANY'S MOTION TO VACATE
	)	
BRIAN MCLEOD,	)	
	)	
Defendant.	)	

Plaintiff, Viktor Kleuchenia ("Plaintiff"), submits this Memorandum in Opposition to Texas Insurance Company, as successor to Onyx Insurance Company ("Texas Insurance"), an Underinsured Motorist Carrier's Motion to Vacate Judgment ("Motion to Vacate" or "Motion").

FACTS AND PROCEDURAL HISTORY

This case arises from a motor vehicle accident occurring on July 17, 2018. Plaintiff filed suit against Defendant Brian McLeod ("Defendant") on July 12, 2021. Plaintiff served Defendant via process server on July 21, 2021. (See Exhibit A, Affidavit of Service). Plaintiff served his underinsured motorist carrier, Onyx Insurance Company ("Onyx"), accepted by the South Carolina Department of Insurance on August 17, 2021. (See Exhibit B, Acceptance of Service). Onyx acknowledged service through its third-party administrator, North American Risk Services, via e-mail on August 25, 2021, but never filed an appearance. (See Exhibit C, E-mail Confirmation).

Plaintiff subsequently learned that Onyx had been assumed by Texas Insurance and Plaintiff sent additional copies of the pleadings to the South Carolina Department of Insurance on September 27, 2022. (See Exhibit D, Acceptance of Service). Plaintiff also sent a copy of the pleadings directly to Texas Insurance via certified mail, with a return receipt signed by Texas

Insurance dated September 27, 2022. (See Exhibit E, Proof of Service). Texas Insurance never appeared or responded to the pleadings.

After resolving claims against Defendant's liability carrier, Plaintiff filed a motion for summary judgment on the issue of liability and motion for an order of reference. Both motions were heard by the Honorable Kristi Curtis and granted on August 11, 2023. Plaintiff subsequently filed an offer of judgment with the Court in the amount of \$50,000.00, which was the amount of Plaintiff's UIM coverage. No offer of acceptance was filed on behalf of Texas Insurance.

A damages trial was scheduled for April 9, 2024. Plaintiff sent a letter directly to Texas Insurance providing notice of the damages trial. (See Exhibit F, Notice Letter). No appearance was made at the damages trial on behalf of Texas Insurance and the Court entered its *Order of Judgment for Damages* on June 4, 2024. Judgment was entered by the Clerk of Court on June 4, 2024, in the amount of \$2,250,000.00 ("June 4th Judgment").

Plaintiff subsequently filed a *Motion for Costs and Interest*, which was granted, and an *Order on Plaintiff's Motion for Costs and Interest* was entered on July 2, 2024. The Clerk of Court amended the initial June 4th Judgment to add costs and interest and entered judgment on July 2, 2024, in the amount of \$2,398,788.11. ("July 2nd Judgment").¹

After receiving a copy of the July 2nd Judgment, Texas Insurance finally filed a notice of appearance and its Motion to Vacate judgment on September 27, 2024. Texas Insurance's Motion seeks to vacate the Court's *Order on Plaintiff's Motion for Costs and Interest* and the July 2nd Judgment on the grounds that *Plaintiff's Offer of Judgment* and *Plaintiff's Motion for Costs and Interests* were not served on Texas Insurance.²

¹ All motions, orders, offers of judgments, or entry of judgments referenced herein are part of the Court's record and not included as exhibits to this Memorandum.

² Texas Insurance's Motion does not seek relief from the initial *Order of Judgment for Damages* and June 4th Judgment.

LEGAL ARGUMENT

Rule 60(b), *SCRCP*, states, in relevant part, “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud, misrepresentation, or other misconduct of an adverse party”³

It is well established that the standard for relief under Rule 60(b) is more rigorous than the standard to set aside default under Rule 55(c). Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607 (2009) (comparing Rule 55 to Rule 60). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, fraud, misrepresentation, or other misconduct of an adverse party. Id. at 608. The intent of the rules is to make it more difficult for a party to obtain relief once the court has entered a judgment, which carries greater finality. Id. “The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief.” BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006).

The trial judge will abuse his discretion if the order is based on an error of law or is without evidentiary support. See Ledford v. Pa. Life Ins. Co., 267 S.C. 671, 230 (1976) (overturning order under Rule 60(b) based on carrier’s mishandling of pleadings). “When considering relief from final judgment, ‘a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute.’” Chewning v. Ford Motor Co., 354 S.C.72, 89 (2003). South Carolina has consistently recognized the “longstanding policy towards final judgment and that important benefits are achieved by the preservation of final judgments.” Id. at 86.

³ Rule 60(b) sets forth additional grounds for relief which would not be applicable to Texas Insurance’s Motion to Vacate on the grounds that *Plaintiff’s Offer of Judgment* or *Plaintiff’s Motion for Costs and Interest* were not served upon Texas Insurance. See id. (“[2] newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59b); . . . [4] the judgment is void; . . . [5] the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.”

I. Texas Insurance is Not Entitled to Relief Under Rule 60(b), *SCRCP*.

Texas Insurance is not entitled to relief under Rule 60(b)(3), because there is no fraud, misrepresentation, or other misconduct of an adverse party. Likewise, Texas Insurance is not entitled to relief under Rule 60(b)(1) because there is no mistake, inadvertence, surprise, or excusable neglect that would warrant relief.

A. Texas Insurance is Not Entitled to Relief Under Rule 60(b)(3) Because It Failed to Appear Within Thirty (30) Days of Service and All Documents Were Served in Accordance with the South Carolina Rules of Civil Procedure.

Texas Insurance cannot seek relief under Rule 60(b)(3) based upon fraud, misrepresentation, or other misconduct of an adverse party because it was served with pleadings on multiple occasions and failed to appear as required by S.C. Code Ann. § 38-77-160. Moreover, Plaintiff served all documents in accordance with the South Carolina Rules of Civil Procedure.

1) There is No Fraud, Misrepresentation, or Other Misconduct Because Texas Insurance Failed to Appear Within Thirty (30) Days of Service as Required by S.C. Code Ann. § 38-77-160.

S.C. Code Ann. § 38-77-160 (“UIM Statute”), specifically states, in relevant part:

No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear.

S.C. Code Ann. § 38-77-160 (emphasis added).

Once served, the UIM carrier has thirty (30) days to appear in the same manner as any other defendant. See id.; see also Williams v. Selective Ins. Co. of Se., 315 S.C. 532, 534, 446 S.E.2d 402, 404 (1994) (“The intent of Section 38–77–160 is to protect an insurance carrier’s right to contest its liability for underinsured benefits.”).

Defendant, Brian McLeod, was served via process server on July 21, 2021. (See Exhibit A). Plaintiff served Onyx with copies of the pleading through the SCDOI on August 17, 2021. (See Exhibit B). North America Risk Services, as third-party administrator of the claim, confirmed receipt of service via e-mail on August 25, 2021. (See Exhibit C). Plaintiff, attempting to have the UIM carrier participate in the case, sent additional copies of the pleadings through the South Carolina Department of Insurance and Texas Insurance directly on September 27, 2022. (See Exhibits D and E). Plaintiff even sent a notice of the damages trial to Texas Insurance, but no appearance was made on its behalf. (See Exhibit F).

Initial judgment was entered on June 4th and amended on July 2nd. Texas Insurance filed a notice of appearance and its Motion to Vacate on September 17, 2024, some 1,127 days after initial service of the pleadings through the SCDOI. Texas Insurance did not file a notice of appearance until after final judgment was entered and there were indications of an ensuing bad faith claim. Undoubtedly, Texas Insurance failed to appear within thirty (30) days of service of the pleadings to defend its interests pursuant to S.C. Code Ann. § 38-77-160.

2) There is No Fraud, Misrepresentation, or Other Misconduct Because Plaintiff Served All Documents in Accordance with the South Carolina Rules of Civil Procedure.

S.C. Code Ann. § 15-35-400 and Rule 68, *SCRCP*, governs offers of judgments and each addresses service using identical language. Specifically, § 15-35-400(A) states, in relevant part:

[A]ny party may, at any time more than twenty days before the actual trial date, file with the clerk of the court a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein, for property, or to effect specified in the offer. The offeror shall give notice of the offer of judgment to the offeree's attorney, or if the offeree is not represented by an attorney, to the offeree himself, *in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure.*

Similarly, Rule 68(a), *SCRCP*, provides in relevant part:

Any party in a civil action, except a domestic relations action, may file, no later than twenty days before trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror for the sum stated therein, or to the effect specified in the offer. **Service of the offer of judgment shall be made as provided in these rules.**

Id. (emphasis added) (amended 2006).⁴

Both § 15-35-400(B) and Rule 68 each plainly and clearly state that an offer of judgment shall be served in accordance with the South Carolina Rules of Civil Procedure. See Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, (1994) (“When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.”).

As such, Rule 5, *SCRCP*, (“Service and Filing of Pleadings and Other Papers”) governs service of documents:

“(a) Service: When Required. Unless otherwise ordered by the court because of numerous defendants or other reason, all (1) written orders; (2) pleadings subsequent to the original summons and complaint, which includes answers, counterclaims, cross claims, replies and amended complaints; **(3) written motions;** other than ones which may be heard ex parte; **(4) written notices;** (5) discovery requests and responses; (6) appearances; (7) demands; **(8) offers of judgments;** (9) designations of record or case; (10) grounds or exceptions on appeal; and (11) other similar papers ***shall be served upon each of the parties of record....***”

Rule 5, *SCRCP*, specifically states that any notices, written motions, or offers of judgments following service of the pleadings are only required to be served on **“parties of record.”** Id. (emphasis added). Rule 5 even explicitly notes “[n]o service need be made on parties in default

⁴ The Notes to the 2006 Amendment to Rule 68 makes clear the intent is for § 15-34-400 and Rule 68 to be consistent with one another. Id. (“This amendment makes this provision consistent with S.C. Code Ann. § 15-35-400, which became effective July 1, 2005”).

for failure to appear . . .” Id. Clearly, the language and intent of Rule 5 does not require continuous service of documents on a non-party of record who has failed to appear after service of pleadings.⁵

Texas Insurance, despite receiving service of the pleadings on multiple occasions, never filed a notice of appearance in the case and never made itself a party of record. There is no authority that would require Plaintiff to serve any notice, motion, or offer of judgment on a non-party of record; particularly an insurance carrier who has been served with pleadings multiple times and failed to appear due to its own mishandling.⁶

B. Texas Insurance is Not Entitled to Relief Under Rule 60(b)(1) Because There is No Mistake, Inadvertence, Surprise, or Excusable Neglect That Would Satisfy Relief.⁷

In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: “(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. Micronics, Inc. v. S.C. Dept’ Revenue, 345 S.C. 506, 510-511, 548 S.E.2d 223, 226 (Ct. App. 2001); Rouvet v. Rouvet, 388, S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010). Rule 60(b)(1) only applies to good faith mistakes of fact if all applicable factors are met. See Hillman v. Pinion, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct. App. 2001) (emphasis added).

⁵ The Notes to the 2005 Amendment further emphasize the intent of Rule 5 is to require service of documents on each “party of record.” Id. (“This amendment to subsection (a) makes explicit that all major documents and papers . . . are to be served on every party of record.”).

⁶ After settlement with the liability carrier, Plaintiff filed a motion for summary judgment on liability and motion for order of reference. Both motions were heard before the Honorable Kristi Curtis on August 7, 2023, in which the full procedural history of the case was presented. Plaintiff’s position was that there does not appear to be authority in South Carolina that would permit the court to enter a judgment (including default) directly against a UIM Carrier. See S.C. Code Ann. § 38-77-160 (“[C]arrier has the right to appear and defend in the name of the underinsured motorist.”). As such, Plaintiff sought to have the issue of liability resolved by the Court and referred to a special referee for damages. Judge Curtis heard the issues in full and ruled on both motions without service upon Texas Insurance. See Order Granting Plaintiff’s Motion for Summary Judgment on Liability, Aug. 15, 2023 (making clear that Texas Insurance has been served with pleadings and failed to appear).

⁷ Texas Insurance’s Motion and supporting affidavit do not specifically cite to any mistake, inadvertence, surprise, or excusable neglect as grounds for relief; however, Plaintiff sets forth his arguments in opposition out of an abundance of caution.

1) There is No Prima Facie Evidence of a Meritorious Defense.

“To justify relief under [Rule 60(b)(1)], a party must establish that he has a meritorious defense” Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989). “A meritorious defense is more than merely a factor to consider under certain 60(b) grounds for setting aside [judgments] . . . ***not only must the movant make a proper showing he is entitled to relief based upon one of the specific grounds, he must also make a prima facie showing of a meritorious defense.***” McClurg v. Deaton, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008) (citing Stearns Bank Nat’l Ass’n v. Glenwood Falls, LP, 373 S.C. 331, 341 644 S.E.2d 793, 798 (Ct. App. 2007)). (emphasis added).

Our courts have repeatedly and consistently held as a matter of law that a carrier’s failure to act after notice of suit does not constitute grounds for relief. See, e.g., Ledford 267 S.C. at 230 (overturning trial court’s order vacating judgment under Rule 60[b][1] where carrier’s attorney failed to respond to pleadings); Sundown, 383 S.C. at 608 (negligent mishandling of pleadings is not grounds for relief under Rule 60[b][1]); compare Johnson vs. Finger 102 S.C. 354, 86 S.E. 673 (1915) (vacating default judgment where attorney filed a motion for more definitive statement wrongfully assuming it extended Answer deadline since Defendant made appearance and showed a bona fide desire to fight the case on the merits).

Even under the lower Rule 55 standard of “good cause” South Carolina courts have repeatedly held as a matter of law that failure to respond to pleadings upon service is not grounds for relief. See, e.g., Richardson, 383 S.C. at 618 (Nothing in the record from carrier explaining failure to answer and negligent oversight is not “good cause.”) Pilgrim v. Miller, 350, S.C. 637, 567 S.E.2d 527 (Ct. App. 2002) (Carrier has an obligation to defend, to act diligently, to take up the matter upon receipt of pleadings); Williams v. Vanvokenburg, 312 S.C. 373, 440 S.E.2d 408

(Ct. App. 1994) (negligence in failing to answer is not good cause to set aside entry of default under Rule 55[c]); Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987) (negligence of an attorney or insurance company in responding to pleadings is not grounds for relief).

Texas Insurance submits an affidavit of Jeffrey Silver in support of its Motion to Vacate wherein Mr. Silver asserts Texas Insurance did not receive service of *Plaintiff's Offer of Judgment* or *Plaintiff's Motion for Costs and Interest* as its sole grounds for relief. Notably, and most importantly, Mr. Silver does not allege Texas Insurance did not receive service of the pleadings and provides no explanation for Texas Insurance's failure to appear. Texas Insurance presents no evidence, much less prima facie evidence, of a meritorious defense for failing to appear or respond to service. See Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 199) (Arguments of counsel are not evidence in arguing a meritorious defense.).

It is indisputable that Texas Insurance was served with the pleadings on multiple occasions and failed to respond or appear. Texas Insurance had a duty to appear and defend its interest or, at very a minimum, a duty to monitor the case following service. See § 38-77-160; see, e.g., Goodson v. American Bankers Insurance Company of Florida, 295 S.C. 400, 368 S.E.2d 687 (Ct. App. 1988) (“[A] party has a duty to monitor the progress of his case.”). Had Texas Insurance filed an appearance, or otherwise monitored the case after service, it would have received notice of all documents filed with the court, including any motions and offers of judgments.

Texas Insurance failed to appear after service of the pleadings and the Rules of Civil Procedure do not require Plaintiff to serve subsequent documents on any nonparty of record. As outlined above, all notices, motions, and the offers of judgments were served in accordance with § 15-35-400(B), Rule 68, and corresponding Rule 5, *SCRCP*. Texas Insurance's mishandling of the pleadings is not grounds for relief as a matter of law.

3) Relief From Judgment Would Substantially Prejudice Plaintiff and Affect His Rights Under His UIM Policy and Pending Claims for Bad Faith.

Even if there was a valid basis for relief – which there is none – the prejudice to Plaintiff outweighs relief. This collision occurred on July 17, 2018. Suit was filed on July 12, 2021, and Plaintiff spent years litigating and incurring substantial costs to present his case. Initial judgment was entered against Brian McLeod on June 4, 2024, almost three full years after suit was filed.

This Motion only comes now that a separate bad faith claim has been filed.⁸ The issue presented in this Motion goes directly to issues involving that claim. What damages Texas Insurance may be responsible for because of the judgment entered against Brian McLeod, as an underinsured motorist, is an issue that should be left to decide in Plaintiff's bad faith claim. Any relief granted by this Court would have a substantial impact on Plaintiff's bad faith claim.

CONCLUSION

Texas Insurance is not entitled to relief under Rule 60(b)(3) because there is no fraud, misrepresentation, or other misconduct on behalf of Plaintiff. Texas Insurance was served with pleadings and failed to appear within thirty (30) days as required by the UIM statute. Plaintiff served all documents in accordance with the South Carolina Rules of Civil Procedure.

Moreover, Texas Insurance is not entitled to relief under Rule 60(b)(1) because there is no mistake, inadvertence, surprise, or excusable neglect as a matter of law. Texas Insurance cannot present prima facie evidence of a meritorious defense and South Carolina law is clear that a carrier's failure to properly handle service of the pleadings is not grounds for relief. Relief from judgment would substantially prejudice Plaintiff and affect his current bad faith claim.

Even assuming there were sufficient grounds for relief under Rule 60(b) – which Plaintiff vehemently contends there is none as a matter of law – vacating the *Order for Costs and Interest*

⁸ Case No.: 4:24-cv-05628-JD.

and the July 2nd Judgment in its entirety would be improper relief because Plaintiff was also awarded taxable costs under Rule 54, *SCRCP*, as part of the *Order for Costs and Interest*. See Rule 54, *SCRCP* (“[C]osts shall be allowed as of course to the prevailing party unless the court otherwise directs . . .”). Nothing in Texas Insurance’s Motion would affect Plaintiff’s entitlement to taxable costs pursuant to Rule 54.

Lastly, Plaintiff will note that Texas Insurance’s Motion does not seek any vacation or relief from the Court’s initial *Order for Damages* and June 4th Judgment, and nothing herein would affect that *Order for Damages* and initial June 4th Judgment.

For the reasons set forth above, Plaintiff respectfully requests the Court deny Texas Insurance’s Motion to Vacate the *Order for Costs and Interest* and July 2nd Judgment.

Respectfully submitted,



Jared C. Williams
South Carolina Bar No. 100806
jared@williamslawsc.com
P.O. Box 403
Mount Pleasant, SC 29464
(843) 991-6528 – Office
(803) 429-3393 – Direct
Attorney for Plaintiff

Charleston, South Carolina
November 25, 2024

Exhibit A

(Affidavit of Service on Brian McLeod)

FILED ELECTRONICALLY FILED - 2022 JUL 25 2:56 PM - HONORARY - COMMON PLEAS - CASE# 2021CP2604596

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY

VIKTAR KLEUCHENIA, et al,

Case No.: 2021CP2604596

v.

BRIAN MCLEOD, et al,

AFFIDAVIT OF SERVICE

DEFENDANT: Brian McLeod

Being duly sworn on my oath, I GINA SHARBOWSKI declare that I am a citizen of the United States, over the age of eighteen, authorized to serve process in this jurisdiction, and not a party to or interested in the proceedings of this action. I received this process on 7-20-21, and that I personally served the following: SUMMONS (JURY TRIAL DEMANDED); COMPLAINT (JURY TRIAL DEMANDED); in regards to the matter, upon:

BRIAN MCLEOD

as follows:

RESIDENTIAL SERVICE: by serving: DIANE MCLEOD, wife/co-resident, personally,
by identifying her and handing her the papers

Sex: F Age: 40-*50's Race: W/Auburn-red hair/5'3"-5'5"/140-150lbs

at:

Complete Address of Service

Day, Date, Time of service

RESIDENTIAL Address:

7327 Hillsboro Court

Wed. **JUL 21 2021** @ 3:05pm

Canton, Michigan 48187

WAYNE County, Michigan

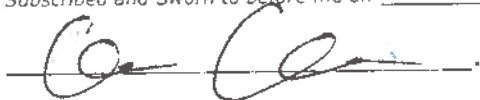
I declare under the penalties of perjury that the information contained in this Affidavit of Service is true and correct.



Gina Sharbowski
Process Server

1221 Bowers Street, #103
Birmingham, MI 48012

Subscribed and Sworn to before me on **JUL 22 2021**



CHRISTOPHER C CHALANDA
NOTARY PUBLIC - STATE OF MICHIGAN
My Commission Expires October 07, 2026
Acting in the County of OSHEL

Exhibit B

(Acceptance of Service by SCDOI - Onyx)



South Carolina Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

HENRY McMASTER
Governor

RAYMOND G. FARMER
Director

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105

August 17, 2021

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
ONYX INSURANCE COMPANY, INC., A RISK RETENTION GROUP
575 S. Saliman Road
Carson City, NV 89701-0000

Dear Sir:

On August 17, 2021, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-87-80(C). By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 38-77-160. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to sdubois@doi.sc.gov. When replying, please refer to File Number 185194, Viktar Kleuchenia v. Brian McCleod, 2021-CP-26-04596.

By:

Gwendolyn L. Fuller
General Counsel
(803)737-6732

Sincerely Yours,

Raymond G. Farmer
Director
State of South Carolina
Department of Insurance

Attachment

CC: Jared C. Williams
Post Office Box 403
Mount Pleasant, SC 29465

ELECTRONICALLY FILED - 2021 Aug 29 8:56 AM - Horry - COMMON PLEAS - CASE#2021CP2604596

Exhibit C

(E-mail Correspondence with NARS)

From: [Jared Williams](#)
To: jared@williamslawsc.com
Subject: Fwd: ONON18070137 Viktar Kleuchenia vs Brian McLeod
Date: Thursday, January 26, 2023 5:37:46 PM
Attachments: [resizedtransparentlogo_438cd81d-722b-4e93-8546-b89722af6258.png](#)
[image001.png](#)
[image001.png](#)

Sent from my iPhone

Begin forwarded message:

From: Jared Williams <jcwilliams@charlestonlaw.edu>
Date: November 8, 2021 at 9:32:32 AM EST
To: Michelle Arline <MArline@narisk.com>
Subject: Re: ONON18070137 Viktar Kleuchenia vs Brian McLeod

Thank you!

Jared

On Mon, Nov 8, 2021 at 8:55 AM Michelle Arline <MArline@narisk.com> wrote:

Jared,

Please see attached.

Thanks,

Michelle

Michelle Arline Sr. Claims Adjuster
P.O. Box 166002 Altamonte Springs, FL 32716-6002
O: 321-441-1224 | 800-315-6090 Ext. 1224 | F: 866-261-8507
[NARS logo](#)



Michelle Arline Sr. Claims Adjuster

P.O. Box 166002 Altamonte Springs, FL 32716-6002

O: (321) 441-1224 | (800) 315-6090 Ext. 1224 | F: (866) 261-8507



From: Jared Williams <jcwilliams@charlestonlaw.edu>

Sent: Friday, November 5, 2021 3:46 PM

To: Michelle Arline <MArline@narisk.com>

Subject: Re: ONON18070137 Viktor Kleuchenia vs Brian McLeod

This Message originated outside of North American Risk Services. Do not click links or open attachments unless you recognize the sender, and know the content is safe.

Michelle -

I was previously provided the attached dec page for Mr. Kleuchenia's policy that was active as of 07/17/18 but it does not list the covered vehicles. Can you provide that policy information, please?

Thank you,

Jared

On Wed, Aug 25, 2021 at 2:45 PM Michelle Arline <MArline@narisk.com> wrote:

Understood. Thank you for the response.

Michelle

Michelle Arline Sr. Claims Adjuster
P.O. Box 166002 Altamonte Springs, FL 32716-6002
O: 321-441-1224 | 800-315-6090 Ext. 1224 | F: 866-261-8507

Michelle Arline Sr. Claims Adjuster
[P.O. Box 166002 Altamonte Springs, FL 32716-6002](#)
O: (321) 441-1224 | (800) 315-6090 Ext. 1224 | F: (866) 261-8507



From: Jared Williams <jcwilliams@charlestonlaw.edu>
Sent: Wednesday, August 25, 2021 2:44 PM
To: Michelle Arline <MArline@narisk.com>
Subject: Re: ONON18070137 Viktor Kleuchenia vs Brian McLeod

This Message originated outside of North American Risk Services. Do not click links or open attachments unless you recognize the sender, and know the content is safe.

Hi, Michelle -

I'm sorry I missed your phone call. You are correct that Mr. McLeod is insured by GEICO and they have filed an Answer on his behalf. I simply

served Onyx as the UIM carrier to meet the court's service deadline in the event UIM coverage is pursued. Please let me know if you have any questions.

Thank you,

Jared

On Wed, Aug 25, 2021 at 2:24 PM Michelle Arline <MArline@narisk.com> wrote:

Mr. Williams,

I tried to reach you via phone today, but your voicemail box is not set up yet.

I am in receipt of the summons and complaint filed on behalf of your client Viktor Kleuchenia. We are a third party administrator for Onyx Insurance, which insured the vehicle Mr. Kleuchenia was operating on the date of loss. Please be advised that Mr. Brian McLeod, who is the named defendant in the complaint, is insured with GEICO Insurance claim# 0381848190101049. Our records indicate that Mr. McLeod has policy limits in the amount of \$1,000,000.

Michelle

Michelle Arline Sr. Claims Adjuster
P.O. Box 166002 Altamonte Springs, FL 32716-6002
O: 321-441-1224 | 800-315-6090 Ext. 1224 | F: 866-261-8507

Michelle Arline Sr. Claims Adjuster

P.O. Box 166002 Altamonte Springs, FL 32716-6002

O: (321) 441-1224 | (800) 315-6090 Ext. 1224 | F: (866) 261-8507



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Exhibit D

(Acceptance of Service by SCDOI – Texas Insurance)



South Carolina Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

HENRY McMASTER
Governor

MICHAEL WISE
Acting Director

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105

September 27, 2022

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Texas Insurance Company
700 North Pearl, 25th Floor
25th Floor
Dallas, TX 75201

Dear Sir:

On September 27, 2022, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-45-170. By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 38-77-160. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. The claimant, within this service letter, provided the following additional information regarding this first party claim: POLICY/CLAIM NUMBER OIC-SC-0001119-02. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to spurvis@doi.sc.gov. When replying, please refer to File Number 190666, Viktar Kleuchenia v. Brian Mcleod, 2021-CP-26-04596.

By:

Gwendolyn McGriff
General Counsel
(803)737-6732

Sincerely Yours,

Michael Wise
Acting Director
State of South Carolina
Department of Insurance

Attachment

CC: Jared C. Williams
Post Office Box 403
Mount Pleasant, SC 29465

ELECTRONICALLY FILED - 2022 Nov 05 2:36 PM - Horry - COMMON PLEAS - CASE#2021CP2604596

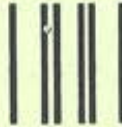
Exhibit E
(Certificate of Service – RRR by Texas Insurance)

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
■ Complete items 1, 2, and 3. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature ☒ <i>Chris Sheets</i> ☐ Agent ☐ Addressee	
1. Article Addressed to: Texas Insurance Company 10805 Old Mill Road Omaha, NE 68154		B. Received by (Printed Name) <i>Chris Sheets</i>	C. Date of Delivery 9-27
2. Article Number (Transfer from service label) 7022 2410 0001 4795 0310		D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No	
3. Service Type ☐ Adult Signature ☐ Adult Signature Restricted Delivery ☒ Certified Mail® ☐ Certified Mail Restricted Delivery ☐ Collect on Delivery ☐ Collect on Delivery Restricted Delivery ☐ Insured Mail ☐ Insured Mail Restricted Delivery (over \$500)		☐ Priority Mail Express® ☐ Registered Mail™ ☐ Registered Mail Restricted Delivery ☐ Signature Confirmation™ ☐ Signature Confirmation Restricted Delivery	
PS Form 3811, July 2020 PSN 7530-02-000-9053		Domestic Return Receipt	

USPS TRACKING#



09/11/2024 11:11



First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

9590 9402 7796 2152 3342 83

United States
Postal Service

• Sender: Please print your name, address, and ZIP+4® in this box•

Jared Williams
P.O. Box 403
Mt. Pleasant, SC 29465



Exhibit F

(Notice of Damages Trial)



Jared C. Williams, Esq.
Licensed in SC
jared@williamslawsc.com

April 1, 2024

Via First-class Mail

Texas Insurance Company
10805 Old Mill Road
Omaha, NE 68154

**RE: Viktor Kleuchenia v. Brian McLeod
Civil Action No.: 2022-CP-26-04596**

To Whom it May Concern:

The above-referenced case is scheduled to be heard on April 9, 2024, starting at 9:00 a.m. with Bobby Buffington, Esq., serving as special referee. Should you have any questions or concerns, please feel free to contact me at (843) 991-6528, or by e-mail at jared@williamslawsc.com.

Sincerely,

Law Office of Jared C. Williams, LLC

A handwritten signature in blue ink, appearing to be 'Jared C. Williams'.

Jared C. Williams

Exhibit G

(E-mail Correspondence 09/21/2022)

From: jared@williamslawsc.com
To: "Mike Smith"
Cc: "Kim Nobles"
Subject: RE: Viktar Kleuchenia v. Brian McLeod
Date: Wednesday, September 21, 2022 11:23:38 AM
Attachments: [09.21.2022 Correspondence to SCDOT.pdf](#)

Mike –

Please see the attached correspondence to the SCDOT. I am trying to get the UIM carrier to respond and participate in the case. I have already sent a letter directly to the Texas Insurance Company, but never received a response.

Thank you,
 Jared

From: Mike Smith <MSmith@thompsonlaw.com>
Sent: Tuesday, September 20, 2022 8:14 PM
To: jared@williamslawsc.com
Cc: Kim Nobles <KNobles@thompsonlaw.com>
Subject: RE: Viktar Kleuchenia v. Brian McLeod

How about mediation by 11/18 and trial not before 1/23/23

G. Michael Smith
 Thompson & Henry, P.A.
 1300 Second Avenue, Third Floor
 Post Office Box 1740
 Conway, SC 29526 (29528)
 Telephone: 843-248-5741
 Fax: 843-248-5112
 Cell: 843-222-2951

CONFIDENTIALITY WARNING:

This electronic message (including any attachments) contains information which may be privileged and/or confidential. The information is intended for use only by the individual(s) or entity named/indicated above. Be aware that any disclosure, copying, distribution, or use of the content of this message/information is prohibited. If you received this message in error, please contact me right away.

From: jared@williamslawsc.com <jared@williamslawsc.com>
Sent: Monday, September 19, 2022 4:59 PM
To: Mike Smith <MSmith@thompsonlaw.com>
Subject: RE: Viktar Kleuchenia v. Brian McLeod

Mike –

I have received word that I should have the LCP by this week, next week at the latest. The vocational

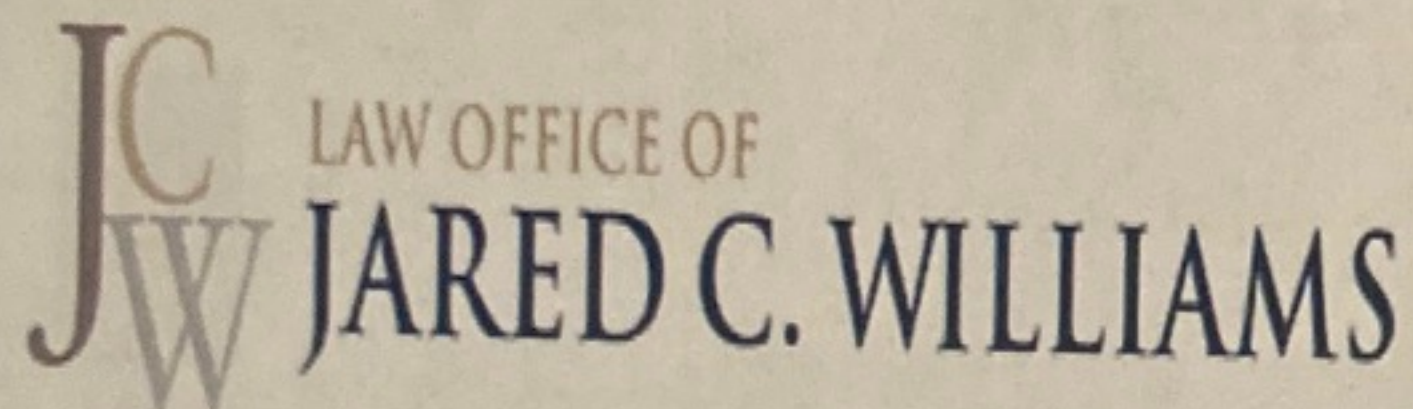
Exhibit H

(Envelope)

Jared Williams
P.O. Box 403
Mt. Pleasant, SC 29465



Texas Insurance Company
10805 Old Mill Road
Omaha, NE 68154



Jared C. Williams, Esq.
Licensed in SC
jared@williamslawsc.com

April 1, 2024

Via First-class Mail

Texas Insurance Company
10805 Old Mill Road
Omaha, NE 68154

**RE: Viktor Kleuchenia v. Brian McLeod
Civil Action No.: 2022-CP-26-04596**

To Whom it May Concern:

The above-referenced case is scheduled to be heard on April 9, 2024, starting at 9:00 a.m. with Bobby Buffington, Esq., serving as special referee. Should you have any questions or concerns, please feel free to contact me at (843) 991-6528, or by e-mail at jared@williamslawsc.com.

Sincerely,

Law Office of Jared C. Williams, LLC

Jared C. Williams

Exhibit I

(09/04/2024 Correspondence from Texas Insurance)



Texas Insurance Company
P.O. BOX 3646, OMAHA, NE 68103-0646

Writer's Direct Line 402-342-4900 ext. 4141; Facsimile 402-393-8558

E-Mail: jeffreysilver@silver-law.net

September 4, 2024

Via Electronic Mail and U.S. Mail

Jared C. Williams, Esq.
P.O. Box 403
Mount Pleasant, South Carolina 29465

RE: Viktor Kleuchenia v. Brian McLeod
Civil Action No.: 2022-CP-04596

Dear Mr. Williams:

This will acknowledge receipt of your August 20, 2024 correspondence directed to Texas Insurance Company ("TIC") enclosing a copy of the Order on Plaintiff's Motion for Costs and Interest (the "Motion").

We are perplexed by not only the Motion but the reference in the Motion to an August 17, 2023 Offer of Judgment, a damages trial on April 9, 2024 and a June 4, 2024 Order of Judgment for Damages returning a judgment in favor of Plaintiff for \$2,250,000.

First, TIC has not issued any insurance policy to your client, Viktor Kleuchenia.

Second, TIC has no record of being served any documents including, but not limited to a summons. If you have evidence of TIC being served, please forward it to my attention.

Third, TIC has no record of receiving an Offer of Judgment of \$50,000 on August 17, 2023. If you have evidence that the referenced Offer of Judgment was sent to TIC, please provide it to the undersigned.

Fourth, TIC has no record of receiving notice of any Motion for Summary Judgment on the issue of liability or Notice of the damages trial on April 9, 2024. If you have evidence of notice of either of these proceedings being sent to TIC, please provide that to me.

Onyx Insurance Company's ("Onyx") records reflect Policy, No. OIC-SC-0001119-2 for the period of March 29, 2018 to March 29, 2019 being issued to Viktor Kleuchenia (the

Jared C. Williams, Esq.
September 4, 2024
Page 2

"Policy"), a copy of which is enclosed. The Policy provides \$25,000 in uninsured/underinsured motorist coverage.

As noted above, we have very few details on how this matter got to its current state. In any event, if you are claiming uninsured/underinsured motorist coverage of \$25,000 under the Policy, please provide any and all documents that support that claim including, but not limited to any consents to settlement that were obtained.

Notwithstanding anything in this correspondence to the contrary, both TIC and Onyx reserve all of their rights with respect to this matter and nothing contained herein should be construed as a waiver of any such rights.

In view of the time frame involved, your early attention to this matter is requested since we may need to take further Court action to protect TIC's and Onyx's interests.

Very truly yours,



JEFFREY A. SILVER
Secretary and General Counsel

JAS/ld

CC: File

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Viktar Kleuchenia,

PLAINTIFF,

v.

Brian McCleod,

DEFENDANT.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2021-CP-26-04596

**TEXAS INSURANCE COMPANY'S
MEMORANDUM IN SUPPORT OF
MOTION TO VACATE**

FACTS AND PROCEDURAL HISTORY

On May 29, 2018, Onyx Insurance Company (hereinafter “Onyx”) issued a commercial automobile policy (Policy No. OIC-SC-0001119-02 hereinafter the “Policy”) to the Plaintiff. That policy included a provision of underinsured motorist (UIM) benefits with limits of \$25,000/\$50,000. The Policy was in effect on July 17, 2018, when the Plaintiff was in a motor vehicle accident with the defendant Brian McCleod. Plaintiff filed suit against the defendant in the instant action on July 12, 2021.

On June 30, 2021, pursuant to the terms of an Assumption and Indemnity Agreement, Texas Insurance Company (hereinafter “Texas”) assumed all of the rights, obligations and liability of Onyx under the Policy. (Exhibit A, Assumption Certificate). Plaintiff served Texas through the South Carolina Department of Insurance on September 27, 2022.

On or about April 1, 2024, Plaintiff purportedly sent to Texas via First-class mail, notice of a hearing in the matter to occur on April 9, 2024. (Exhibit B, Correspondence

from Williams to Texas dated April 1, 2024). There is no mention of the location or scope of the hearing other than it is before Bobby Buffington as special referee.¹ The next communication received by Texas regarding this matter was on August 20, 2024, wherein Plaintiff provided Texas with a copy of the July 1, 2024, Order on Plaintiff's Motion for Costs and Interest and made a demand for the judgment amount. (Exhibit C, Correspondence from Williams to Texas dated August 20, 2024). The instant motion for relief of this judgment follows.

ARGUMENT

Other than service of the Summons and Complaint, and the letter of August 20, 2024, demanding amounts far in excess of Texas' UIM coverage, Texas received no service of any motions, nor notice of any hearings in this matter. In particular, Texas was never, in accordance with the South Carolina Rules of Civil Procedure, served with or otherwise notified of: (1) the Plaintiff's settlement with the Defendant's liability carrier, (2) the Plaintiff's Motion for Summary Judgment, (3) notice of the hearing on Plaintiff's Motion for Summary Judgment, (4) Plaintiff's Offer of Judgment, (5) notice of the damages hearing before the Special Referee, (6) Plaintiff's Motion for Costs and Interest, and (7) notice of the hearing on Plaintiff's Motion for Costs and Interest before the Special Referee.

Rule 5, S.C. R. Civ. Pro

SCRCP 5 states, in relevant part:

(a) Service: When Required. Unless otherwise ordered by the court because of numerous defendants or other reasons, all (1) written orders; (2) pleadings subsequent to the original

¹ Texas does not concede that this notice was received, but in any event such does not comport with the notice requirements set for in Rule 6(d) S.C. R. Civ. Pro.

summons and complaint, which includes answers, counterclaims, cross claims, replies and amended complaints; (3) **written motions**, other than ones which may be heard ex parte; (4) **written notices**; (5) discovery requests and responses; (6) appearances; (7) demands; (8) **offers of judgment**; (9) designations of record or case; (10) grounds or exceptions on appeal; and (11) other similar papers **shall be served upon each of the parties of record**. No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.

(emphasis added).

The Plaintiff had the presence of mind to serve both Onyx and Texas as UIM carriers for the Plaintiff. However, despite that, the Plaintiff neglected to serve any subsequent motion, notice, demand or offer of judgment upon Texas. It does not appear from the record that the Plaintiff disputes his failure to serve any of the materials listed under SCRCP 5(a).

Failure to serve the various motions, notices of hearing and offers of judgment is a violation of Texas' due process rights. "[I]t is fundamental that no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are affected." Tryron Fed. Sav. & Loan Ass'n v. Phelps, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992) (citing Insurance Co. of North America v. Hyatt, 290 S.C. 159, 348 S.E.2d 532 (1986)). "Generally, a person against whom a judgment or order is taken without notice may rightly ignore it and may assume that no court will enforce it against his person or property." Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002). "The requirements of due process not only include notice, but also

an opportunity to be heard in a meaningful way, and judicial review.” S.C. Dep't of Soc. Servs. v. Holden, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995). “Clearly, failure to serve a particular party with a motion or order adverse to that party's rights would render it ineffective against that party.” Keowee Inv. Grp., LLC v. Pickens Cty., 2004 S.C. App. Unpub. LEXIS 423, at *9 (S.C.App. 2004), *citing* Conner v. City of Forest Acres, 348 S.C. 454, 461-62, 560 S.E.2d 606, 609-10 (2002) (noting that service of the notice of intent to appeal is a jurisdictional requirement, and the failure to serve particular parties meant they were not part of the appeal); Universal Benefits, Inc., 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002) (noting that judgments should not be issued without notice to a party whose rights are affected, the court stated that "a person against whom a judgment or order is taken without notice may rightly ignore it and may assume that no court will enforce it" against him).

It does not appear from the Order on Plaintiff's Motion for Costs and Interest that the Court inquired into the service on, or notice provided to Texas of either the Offer of Judgment, the Motion for Costs and Interests, or the hearing on the same. Based on the Plaintiff failure to comply with SCRCP 5(a), Texas never had a meaningful opportunity to accept or reject the Plaintiff's Offer of Judgment. An award based upon the unserved Offer of Judgment and subsequent Motion for Costs and Interest is improper and should be vacated.

Rule 6, S.C. R. Civ. Pro.

SCRCP 6(d) regarding time for service of motions and supporting affidavits states, in relevant part:

A written motion other than one which may be heard *ex parte*, and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time. The moving party may serve reply affidavits at any time before the hearing commences.

(emphasis added).

As stated above, the Plaintiff never served any written motions on Texas. Texas was never served with the written Motion for Costs and Interest or the supporting affidavit of counsel regarding damages, as required by the rules. Additionally, while Texas disputes that it was served with the letter regarding the April 9, 2024, hearing, assuming *arguendo* that such notice was sent, it did not describe the scope or purpose of the hearing or give a location for such hearing. It also did not provide ten (10) days' notice of the hearing, as required under SCRCP 6(d). Again, and for the same reasons cited above, failure to provide notice of any of these hearings, including the damages trial and the hearing on Plaintiff's Motion for Costs and Interest is a violation of the rules of civil procedure and Texas' due process rights. Any award based upon an unserved motion, supporting affidavit or hearing of which Texas did not receive timely notice is improper and should be vacated.

Rule 68, S.C. R. Civ. Pro. and S.C. Code § 15-35-400

The Plaintiff premises his claim for extra-contractual damages against Texas, in excess of its UIM limits under the Plaintiff's policy, on the basis that he is entitled to costs

and interest pursuant to South Carolina law regarding Offers of Judgment. Offers of Judgment are governed by both SCRCP 68 and S.C. Code § 15-35-400. Both are substantially the same regarding the procedure necessary to present a valid offer. SCRCP 68 states:

Any party in a civil action, except a domestic relations action, may file, no later than twenty days before the trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror for a sum stated therein, or to the effect specified in the offer. Service of the offer of judgment shall be made as provided in these rules. Within twenty days after service of the offer of judgment or at least ten days prior to the trial date, whichever date is earlier, the offeree or his attorney may file a written acceptance of the offer of judgment. Upon the filing, the court shall immediately issue the judgment and the clerk shall enter the judgment as provided in the offer of judgment. If the offer of judgment is not accepted within twenty days after notification, or prior to or on the tenth day before the actual trial date, whichever date occurs first, the offer shall be considered rejected and evidence thereof is not admissible except in a proceeding after trial to fix costs, interest, attorney's fees, and other recoverable monies.

S.C. Code § 15-35-400(A) states:

Except in domestic relations actions, after commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not other relief is sought, any party may, at any time more than twenty days before the actual trial date, file with the clerk of the court a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein, for property, or to the effect specified in the offer. The offeror shall give notice of the offer of judgment to the offeree's attorney, or if the offeree is not represented by an attorney, to the offeree himself, in accordance with the service rules for motions and other pleadings set forth

in the South Carolina Rules of Civil Procedure. Within twenty days after notification, or at least ten days prior to the trial date, whichever date is earlier, the offeree or his attorney may file with the clerk of the court a written acceptance of the offer of judgment. Upon the filing, the clerk shall enter immediately judgment of the stipulation. If the offer of judgment is not accepted within twenty days after notification or prior to or on the tenth day before the actual trial date, whichever date occurs first, the offer shall be considered rejected and evidence thereof is not to be admissible except in a proceeding after the trial to fix costs, interests, attorney's fees, and other recoverable monies. Any offeror may withdraw an offer of judgment prior to its acceptance or prior to the date on which it would be considered rejected by giving notice to the offeree or his attorney in accordance with the service rules for motions and other pleadings outlined in the South Carolina Rules of Civil Procedure. Any offeror may file a subsequent offer of judgment in any amount provided that the subsequent offer supersedes any earlier offer that was rejected by the offeree or withdrawn by the offeror, and, on filing, terminates any rights of interest or costs that may have been applicable to the superseded offer. Notwithstanding this provision, an offer is not considered rejected upon the making of a counteroffer by the offeree, but shall remain effective until accepted, rejected, or withdrawn as provided in this subsection. Any and all offers of judgment and any acceptance of offers of judgment must be included by the clerk in the record of the case.

S.C. Code § 15-35-400.

Both the rule and the statute require service of the Offer of Judgment. SCRCP 68 states that "Service of the offer of judgment shall be made as provided in these rules" and indeed establishes a deadline for response of the offeree based upon that date of service. (emphasis added). However, S.C. Code § 15-35-400 goes a step further and provides that "The offeror shall give notice of the offer of judgment to the offeree's attorney, or if the offeree is not represented by an attorney, to the offeree himself, in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil

Procedure.” (emphasis added). Therefore, any argument that Texas somehow had waived its right to service and notice of the Offer of Judgment by either (a) failing to retain counsel, or (b) failing to otherwise appear in the case, flies in the face of the clear statutory requirement that Texas should have been served with the Offer of Judgment in this matter. Because the offer was never served, it is void and any damages awarded based on the position that it was rejected are improper.

Furthermore, it is important to note that both SCRCP 6 and S.C. Code § 15-35-400(C) provide that neither the rule nor the statute shall be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney’s fees or other monies in accordance with the provisions of any written contract between the parties to the action. In other words, even if an award of costs and interest was valid based upon a properly served offer, such would not operate to alter the terms of the insurance contract between the Plaintiff and Texas, or otherwise expose Texas to extra-contractual damages in this case.

Rule 60, S.C. R. Civ Pro

Texas makes this motion pursuant to SCRCP 60(b) on the grounds that the Special Referee, in awarding costs and interest, made an error of law which renders the judgment void. Additionally, the failure to serve or otherwise give proper notice to Texas of the foregoing enumerated items, was either mistake, inadvertence or excusable neglect on the part of the Plaintiff, or operates as an extrinsic fraud upon the Court, both of which would render the judgment likewise improper.

The definition of void under SCRCP 60 “only encompasses judgments from courts which failed to provide proper due process...” Linda Mc Company, Inc. v. Shore, 375 S.C.

432, 653 S.E.2d 279 (S.C.App. 2007), *see also* Sanders v. Smith, 431 S.C. 605, 848 S.E.2d 604 (S.C.App. 2020). A void judgment is one that, from its inception, is a complete nullity and is without legal effect. Belle Hall Plantation Homeowner's Association, Inc. v. Murray, 419 S.C. 605, 799 S.E.2d 310 (S.C.App. 2017), and Ware v. Ware, 404 S.C. 1, 743 S.E.2d 817 (2013). In this case, it is clear that Texas was entitled to service and notice of the various motions and hearings outlined above and giving rise to the court's award of costs and interest. Based on the foregoing arguments, the lack of service and notice were violations of Texas' due process rights. Because Texas did not receive service of the Offer of Judgment, service of the Plaintiff's Motion for Costs and Interest, or notice of the hearing awarding such, the Order on Plaintiff's Motion for Costs and Interest is void.

In addition, either Plaintiff's failures regarding service and notice were a mistake, for which the award of costs and interest should be vacated, or it was intentional, which operates as an extrinsic fraud upon the court. "The court grants relief for extrinsic fraud but not intrinsic fraud on the theory that intrinsic deceptions should be discovered during the litigation itself, and to permit such relief would undermine the stability of all judgments. The essential distinction between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover the fraud." Gainey v. Gainey, 382 S.C. 414, 675 S.E.2d 792 (S.C.App. 2009). Relief from judgment is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action. Id. Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Id. *See also* Ray v. Ray, 374 S.C. 79, 647 S.E.2d 237 (2007), Jamison v. Ford Motor

Co., 373 S.C. 248, 644 S.E.2d 755 (S.C.App. 2007), *and Raby Const., LLP v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004).

Plaintiff's failures to comply with the service and notice rules prevented Texas from knowing about or otherwise responding to the Offer of Judgment, the Motion for Costs and Interest or the hearing on the motion. As a result, Texas did not have the opportunity to try the case relevant to its potential liability as the UIM carrier and the lack of service and notice fundamentally deprived Texas of its opportunity to (1) accept or deny the offer and (2) to be heard on the issue of the Plaintiff's prayer for costs and interest. The foregoing amounts to an extrinsic fraud upon Texas and the court and therefore the award for costs and interest should be vacated.

S.C. Code § 38-77-160

The Plaintiff appears to believe that the lack of an appearance by Texas as the UIM carrier in this case operates as a default or otherwise is construed as a waiver of Texas' rights of due process or service under the South Carolina Rules of Civil Procedure. In support of this belief, the Plaintiff cites the UIM statute at S.C. Code § 38-77-160. That section states in part:

No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record. In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the

underinsured motorist insurer may assume control of the defense of action for its own benefit. No underinsured motorist policy may contain a clause requiring the insurer's consent to settlement with the at-fault party.

S.C. Code § 38-77-160. "The intent of § 38-77-160 is to protect an insurance carrier's right to contest its liability for underinsured benefits. An insured must therefore preserve the right of action against an at-fault driver so long as the underinsured carrier has not agreed to the amount and payment of underinsured motorist benefits. In the event the insured chooses to settle with the at-fault party's liability carrier, the underinsured carrier has the option to assume control of the defense of the action as provided in § 38-77-160." (emphasis added). Broome v. Watts, 319 S.C. 337, 340, 461 S.E.2d 46, 48 (1995) *citing* Williams v. Selective Ins. Co., 315 S.C. 352, 446 S.E.2d 402 (1994). The language of the statute is permissive in nature, not mandatory, and while the insurer has the right to appear and defend in the name of the underinsured motorist, there is no requirement that the insurer do so. Indeed, the courts of this state have recognized that "although the UIM carrier 'steps into the shoes' of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist." Broome, 319 S.C. at 340, 461 S.E.2d at 48. Furthermore, the courts have recognized in application of S.C. Code § 38-77-160 that the UIM carrier is neither a party to the litigation nor in privity with the underinsured defendant nor the defendant's liability carrier. Allstate Ins. Co. v. Donaldson, 339 S.C. 202, 207, 528 S.E.2d 679 (S.C.App. 2000).

Nothing in Texas' election not to appear or defend in this action constitutes a waiver of its rights under due process or its service rights under the South Carolina Rules of Civil Procedure. It is also important to point out that Texas is not a "party" to the action, nor has default been entered against Texas in this case. However, even if it were in default, Texas

would have been entitled to notice of any trial or hearing on damages in this matter under Rule 55(b)(2) S.C. R. Civ Pro.

Bad Faith

The Plaintiff appears to take the position that this motion has been interposed in order to circumvent the U.S. District Court's authority to rule upon the Plaintiff's collateral bad faith action. However, Plaintiff fails to recognize that this motion was filed *prior* to the Plaintiff's filing of a collateral action alleging bad faith against Texas. In that regard, Texas does not seek to relitigate through this motion either the liability of the Defendant in this case, nor the damages awarded under the initial damages order entered on June 04, 2024. Instead, the purpose of this motion is to point out that Texas did not receive notice or due process of various filings and hearings in violation of S.C. law and the Rules of Civil Procedure, regarding damages that the Plaintiff clearly seeks to construe as extra-contractual under Texas' insurance contract with the Plaintiff.² Nothing in this motion will affect the contractual obligations between the parties which Texas asserts it has already satisfied, nor will any ruling in this matter divest the U.S. District Court's authority or jurisdiction to rule on the allegations by the Plaintiff for breach of contract.

CONCLUSION

For the foregoing reasons, as well as those to be argued at hearing in this matter, Texas Insurance Company's Motion to Vacate should be granted.

² Texas explicitly denies that any order or award in this case expands the contractual coverage provided to the Plaintiff under the UIM provisions of the insurance contract, such limits already having been tendered to the Plaintiff upon notice and evaluation of the damages award by this court.

GRIFFITH, FREEMAN & LIIPFERT, LLC

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ATTORNEYS FOR TEXAS INSURANCE
COMPANY, AS SUCCESSOR OF ONYX
INSURANCE COMPANY, INC., A RISK
RETENTION GROUP

December 3, 2024
Beaufort, South Carolina

VIKTAR KLEUCHENIA vs BRIAN McCLEOD
21-CP-26-04596 - RULE 60 HEARING

1 IN THE COURT OF COMMON PLEASE
2 STATE OF SOUTH CAROLINA
 COUNTY OF HORRY

3 **VIKTAR KLEUCHENIA,**
4 **Plaintiff,**

8
9

VS.

CIVIL ACTION NUMBER
2021-CP-26-04596

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13

14 BRIAN McCLEOD,
15 Defendant.

16

17 -----/

18 The RULE 60 MOTION HEARING, in the
19 above-entitled cause, taken pursuant to Notice
20 and agreement, before Special Referee, Bobby
21 Buffington and Naomi McCracken, Stenographic
22 Reporter and Notary Public, all via zoom
23 videoconference, on the 5th day of December,
24 2024, commencing at or about the hour of
25 9:01 a.m.

CERTIFIED COPY



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800-791-1100 www.coastalcourt.com

1 APPEARANCE OF COUNSEL :

2

FOR THE, PLAINTIFF:

3

VIA VIDEOCONFERENCE

4

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8

FOR THE INSURANCE COMPANY, AS SUCCESSOR TO
ONYX INSURANCE COMPANY, AN UNDERINSURED
MOTORIST CARRIER :

9

10

VIA VIDEOCONFERENCE

11

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I N D E X

PAGE

OPENING REMARKS AND STIPULATIONS ----- 4

CERTIFICATE ----- 55
(NO EXHIBITS MARKED.)



1 THE COURT: This is in the case of
2 Viktar Kleuchenia versus Brian McLeod,
3 Civil Action Number 2021-CP-26-04596.
4 And we are here today on the Texas
5 Insurance Company's motion to vacate.

6 So, Mr. Freeman, I will turn it
7 over to you for your argument.

8 MR. FREEMAN: Good morning. And
9 obviously you're familiar, at least in
10 passing, with this case. I know you
11 are the special referee that was
12 assigned by the court and issued some
13 damages orders in this matter.

14 So I'll be brief in my recitation
15 of the facts. But just for the record,
16 I do want to establish some dates of
17 the proceedings in this matter.

18 So the plaintiff in this case,
19 Mr. Kleuchenia, was issued a commercial
20 auto policy by carrier, Onyx, in May,
21 May 29th of 2018. Subsequently to
22 that, plaintiff had a motor vehicle
23 accident on July 17th, 2018 and filed
24 suit on that on July 12, 2021 against
25 the defendant, Mr. McLeod.



1 Texas Insurance purchased Onyx
2 Insurance, which was the carrier for
3 that commercial auto policy, on June
4 30th, 2021 and assumed various rights
5 and liabilities of Onyx.

6 Liability carrier for the
7 defendant answered on behalf of the
8 defendant on July 26th, 2021. And
9 plaintiff, who had previously served
10 Onyx as the UIM carrier, subsequently
11 served Texas as the UIM carrier in
12 September of -- on September 27th, 2022
13 through the Department of Insurance.

14 And I see Jeff Silver, who is
15 general counsel for Texas Insurance, is
16 joining us on Zoom as well.

17 The case proceeded as they
18 normally do. The plaintiff filed and
19 served an offer of judgment on the
20 liability carrier on January 17th,
21 2023, which was accepted by the
22 liability carrier, who was represented
23 by Mike Smith, in Horry County on
24 January 25th, 2023.

25 Subsequent to that, the plaintiff



1 filed a motion for summary judgment on
2 April 10th, 2023. Now, Texas did not
3 receive either the motion or notice of
4 that motion. The plaintiff also filed
5 a motion to strike its jury demand and
6 assign a special referee on April 10th,
7 2023, that also was not served on
8 Texas.

9 There was a Form 4 entered
10 granting the motion for summary
11 judgment and referring this case to the
12 special referee on August 11th, 2023.
13 That order also struck the jury demand
14 of the plaintiff.

15 The motion specifically stated
16 that the reference to the special
17 referee was to pursue UIM benefits.
18 But, again, not served on the UIM
19 carrier, or there was no notice given
20 to the UIM carrier.

21 The plaintiff then filed an offer
22 of judgment for UIM benefits on August
23 17th, 2023. That offer of judgment was
24 not served on Texas, and that is going
25 to be central to this motion.



1 Nonetheless, the damages hearing
2 occurred on April 9th, before Your
3 Honor, of 2024. Now, there's some
4 dispute about whether or not the
5 plaintiff attempted to notify Texas of
6 that hearing. But regardless, Texas
7 denies receiving notice of that hearing
8 and the notice that has been provided
9 would be defective, nonetheless.

10 Damages award was filed by Your
11 Honor on June 4th, 2024. The damages
12 award, original damages award was not
13 ever -- was never served on Texas or
14 provided to Texas. And then a
15 subsequent motion for costs was filed
16 on June 5th, 2024, also, again, not
17 served on Texas as the UIM carrier.

18 There was a hearing on that.
19 Again, no notice was given to Texas on
20 that, and the order granting costs was
21 filed by Your Honor on July 2nd, 2024.

22 So those are the pertinent dates
23 for the purposes of our motion and the
24 background for the timeline to kind of
25 where we find ourselves today.



1 Now, I just want to be clear about
2 the scope of this motion because I
3 think it is much more limited than
4 perhaps the plaintiff maybe originally
5 thought.

6 We're not disputing any liability
7 issues on behalf of the defendant.
8 We're not disputing the plaintiff's
9 damage award of June 4th, 2024. We're
10 not disputing that the damage award of
11 June 4th, 2024 would trigger UIM
12 coverage up to the limits of the UIM
13 policy.

14 We're only disputing the award of
15 costs and interest based on the offer
16 of judgment that was never -- never
17 served on Texas. And we certainly
18 don't concede that the award of costs
19 or interest is some sort of extra
20 contractual damage that would trigger
21 any liability beyond the coverage
22 limits.

23 So, you know, I briefed in general
24 our argument. I'm not going to go, you
25 know, super in depth to repeat all



1 that. But for the record, you know,
2 this motion is made pursuant to South
3 Carolina Civil Procedure Rule 60, and
4 we believe that the award of the costs
5 and the interest is void and should be
6 vacated due to several reasons.

7 Void judgments, obviously, are
8 judgments that were made without due
9 process. And that's pretty central to
10 the issue here.

11 Lack of service of the offer of
12 judgment of the motions and notices of
13 hearings, those are all violations of
14 Texas's due process. Any award on the
15 offer of judgment that wasn't served or
16 any motion that wasn't served or any
17 hearing that Texas didn't receive
18 notice of would be void under Rule 60
19 because there was no -- there was no
20 due process.

21 Rule 60 provides that the judgment
22 should be vacated in situations where
23 either the court doesn't have personal
24 jurisdiction, subject matter
25 jurisdiction, or there was a lack of



1 due process.

2 Rule 60 also provides for a
3 vacation of the award in circumstances
4 that constitute extrinsic fraud.

5 Now, I want to be clear here, I'm
6 not -- I'm not accusing plaintiff or
7 his counsel of defrauding the court.
8 But the definition extrinsic fraud is
9 any situation that leads to a party
10 being prevented from exhibiting or
11 trying a case such that there was never
12 any real contest before the court of
13 the subject matter of the action.

14 And for this purpose, the subject
15 matter would be the offer of judgment.
16 Again, since it was never served, you
17 know, Texas never had an opportunity to
18 accept or deny it, and an award based
19 on that offer of judgment would be
20 without due process.

21 Now I'll go quickly through, kind
22 of, the obligations of service in this
23 case, and we'll start with South
24 Carolina Civil Procedure 5. Rule 5
25 requires service of all written



1 motions, offer of judgments, demands,
2 written notices.

3 Now, I know the plaintiff is cited
4 to part of the rule that says the
5 parties in default are not required to
6 necessarily be served with papers under
7 the rule. But that language in SCRCP 5
8 only exempts parties in default.

9 And I think it's important to
10 point out in this case, you know, Texas
11 is not a party to this action, first of
12 all. And second of all, Texas has
13 never been held in default. And Your
14 Honor notes that specifically in a
15 footnote in the original damages award,
16 that Texas is not a party in default in
17 the action.

18 Texas has never been held in
19 default in this matter, and even if it
20 was in default, it was a party in
21 default, they still would have been
22 entitled to notice and the hearing on
23 damages's under Rule 55(b)(2).

24 Now, Texas, as a non-default
25 party, never had any notice of any



1 hearing damages on it. But, again,
2 even it was in default, there are rules
3 in place to protect defaulted
4 defendants so that, you know, they
5 don't have damages sprung on them
6 without some sort of notice of a
7 hearing.

8 Going on to Rule 6 of the South
9 Carolina Rules of Civil Procedure that
10 has to do service of motions. And it
11 says, "Written motions and affidavits
12 in support must be served not later
13 than ten days prior to the hearing on
14 the motions."

15 Again, none of the motions were
16 served on Texas, none of the motions in
17 this case were served on Texas. The
18 purported notice of the hearing for the
19 damages was sent via First Class Mail,
20 regular mail, eight days before the
21 damages hearing without the provision
22 of the motion itself or any supporting
23 affidavits.

24 Now, obviously I wasn't at that
25 hearing. I don't know necessarily if



1 there were affidavits supplied in
2 support of that motion. But, in any
3 event, it was never served on Texas in
4 accordance with Rule 6. Again,
5 violation of due process.

6 You know, kind of quickly moving
7 on to the offer of judgment itself.
8 You know, that's been filed with the
9 Court and is part of the Court record.
10 The offer of judgment specifically
11 states that it's made pursuant to both
12 South Carolina Rule of Civil Procedure
13 68 and South Carolina Code Section
14 15.35.400.

15 And it's interesting, if you look
16 at the offer of judgment, which is made
17 to the UIM carrier, it also states that
18 it can be accepted by the UIM carrier
19 or its counsel. And the offer of
20 judgment itself demands service of a
21 response in accordance with the South
22 Carolina Rules of Civil Procedure.

23 So the plaintiff wants to be
24 served with things pursuant to South
25 Carolina Rules of Civil Procedure, but



1 it's not afforded that same diligence
2 with respect to Texas.

3 Now, obviously, offers of judgment
4 are ruled by South Carolina Rules of
5 Civil Procedure 68 and South Carolina
6 Code 15.35.400. Both of those require
7 service of the offer of judgment. And
8 the language in the rule is compulsory.
9 It's not optional. The offer of
10 judgment must be served on -- on the
11 party.

12 Now, what's interesting is the
13 very slight difference between South
14 Carolina Rule of Civil Procedure 68 and
15 the code. The code section actually
16 goes further than the rule. And the
17 code section requires service of the
18 offer on the offeree himself, if he's
19 not represented by counsel. The rule
20 doesn't state, but the statute says
21 that the offeree must receive service
22 of the offer of judgment.

23 And, you know, this is pretty
24 common sense. I mean, you can't demand
25 that someone accept a settlement offer



1 within a certain amount of time if you
2 never give them a settlement offer.

3 Additionally, both Rules 68 and
4 the code section state that they shall
5 not be interpreted to aggregate any
6 contractual rights of any party
7 concerning attorneys fees or other
8 money in accordance with the written
9 contract.

10 So, again, the insurance agreement
11 that brings Texas as an interested
12 party to this case is a written
13 contract. It provides coverage limits
14 under the contract, which are capped at
15 \$50,000.

16 So we don't concede that, you
17 know, an offer of judgment if properly
18 served and properly rejected and a
19 proper award of cost and interest would
20 trigger any extra contractual damages
21 above and beyond the coverage limits,
22 which is not really an issue for
23 today's hearing, but it simple pointing
24 out that the rule does address that
25 situation.



1 I think part of why we end up
2 where we are, again, has to do with the
3 plaintiff's interpretation of the UIM
4 statute, which is found at 38.77.160.
5 Part of that is because the statute
6 requires appearance of a served UIM
7 carrier within 30 days after service,
8 if the UIM carrier is going participate
9 in the defense of the defendant.

10 The difference, I think, in the
11 reading between our interpretation of
12 the statute, I think, the legal
13 interpretation of the statute is versus
14 what the plaintiff would argue is that
15 the UIM carrier has the option to
16 appear and defend it in the matter.

17 Obviously, the purpose of the UIM
18 statute is to allow the carrier to
19 contest liability for underinsured
20 benefits. Timely -- a failure to
21 timely appear to contest that and a
22 subsequent entry of default would
23 result, I think, in the loss of a
24 carrier to argue their liability for
25 UIM benefits under the applicable



1 policy.

2 What we don't have here is a
3 situation where the carrier is
4 disputing liability for the UIM benefit
5 in its contract. Now, the UIM statute,
6 or the failure of the UIM carrier to
7 appear does not operate as any sort of
8 waiver of due process rights.

9 And, in fact, I was trying to
10 figure out last night maybe what I
11 might be missing here because I really
12 didn't understand what I was missing.
13 So, you know, I pulled out the law of
14 automobile insurance handbook for South
15 Carolina to look through that because I
16 usually do that whenever I've got a
17 question about UIM benefits that I
18 don't understand.

19 And my friend, William Barnes,
20 wrote this section on UIM. And in
21 that, he references a South Carolina
22 Department of Insurance bulletin note
23 that South Carolina Department of
24 Insurance Bulletin 489. And I'm happy
25 to supplement this after the hearing.



1 But what that bulletin note from
2 the Department of Insurance says is,
3 "Ordinarily, the UIM carrier is under
4 no duty to appear or defend the
5 punitive at-fault driver who's been
6 sued by an injured party claiming
7 entitlement to the UIM benefits."

8 However, the Department of
9 Insurance goes on. It says, "This
10 section of the UIM Statute 38.77.160
11 affords the UIM carrier the right to
12 appear and participate in the defense."

13 So the Department of Insurance
14 then goes on to say, "It is the intent
15 of this section that the control of the
16 defense of the punitive uninsured --
17 underinsured motorist passes the UIM
18 carrier only when the liability limits
19 have been tendered and paid and the UIM
20 carrier elects to assume control of the
21 defense."

22 Obviously, again, in this case,
23 the UIM carrier is not arguing either
24 the liability or the original damages
25 award against the punitive at-fault



1 defendant driver in this case. The
2 issue here is only that there was, you
3 know, a lack of due process in that
4 offer of judgment provision.

5 Also, I just want to point out for
6 the record, you know, in this case, the
7 UIM carrier is not a party. So, you
8 know, I think interchangeably, the
9 plaintiff wants to characterize the UIM
10 carrier as a party and then say it's
11 not a party for purposes of service.
12 But under South Carolina law, you can't
13 award damages against a non-party.
14 Damages can only be awarded against a
15 named defendant.

16 And I suspect that this Court was
17 aware of that in the way that it worded
18 its orders. There's no order in this
19 case against the UIM carrier. There's
20 no order in this case awarding damages
21 against Texas. The only damages that
22 have been awarded in this case have
23 been in favor of the plaintiff.

24 And for the authority of this, you
25 basically have to look to South



1 Carolina law on joint and severed
2 liability, you know, the -- the --
3 there have been a body of case law
4 developed about examining situations
5 where nonparties may be apportioned
6 liability and damages in a case.

7 And what the South Carolina courts
8 have basically landed on -- and this is
9 in Machin versus Carus Corp., it's a
10 2017 case, 419 S.C. 527. The South
11 Carolina Supreme Court, "Only
12 defendants listed on the jury form can
13 be included in an allocation of fault."

14 So, basically, the UIM carrier
15 here is not a potential tortfeasor so
16 you can't award damages against the
17 nonparty, non-potential tortfeasor.

18 The UIM carrier here is involved
19 in this case merely because it provides
20 insurance that may cover some of the
21 damages that are awarded against the
22 defendant, and merely because it may be
23 required to pay those damages.

24 The proper form to recover from a
25 UIM carrier directly would be in an



1 action against the UIM carrier,
2 subsequently, if such is warranted, and
3 that is just not what we have here.

4 So, I mean, Judge, like I said, I
5 don't want to -- I don't want to beat
6 the dead horse, but the issue here goes
7 to service of the offer of judgment,
8 service of the motions in support of
9 that, notice of the hearings. Texas
10 has had none of that, and, therefore,
11 did not have meaningful opportunity to
12 evaluate the offer of judgment, accept
13 it or deny it, or participate in any of
14 the other proceedings in this case
15 because other than the service of the
16 pleadings, originally, they didn't
17 receive any notice of anything after
18 that.

19 I'll be happy to answer any
20 questions. But I think, you know, I've
21 pretty much covered that and what
22 we've -- what we've stated in the brief
23 as the basis for the motion.

24 THE COURT: Yeah. Thank you,
25 Mr. Freeman. And I've reviewed -- not



1 in depth, but I've reviewed the
2 motion -- or the memorandum that you
3 filed yesterday, and I'll look at that
4 again.

5 MR. FREEMAN: Also, obviously,
6 you've got the affidavit of Jeff Silver
7 that was attached with our motion, you
8 know, that states the position of Texas
9 and what they did and did not receive.

10 You know, Mr. Silver is also on
11 the line if you have any questions for
12 him.

13 THE COURT: All right. Great.
14 Thank you.

15 MR. FREEMAN: Thank you.

16 THE COURT: Mr. Williams, I'll
17 turn it over to you.

18 MR. WILLIAMS: Thank you,
19 Mr. Buffington.

20 Likewise, I, too, filed a memo
21 with the Court with corresponding
22 exhibits, and I'll try to rely heavily
23 on a that memorandum in hopes that I
24 can try to be somewhat brief here
25 today.



1 But let me start by maybe going
2 back over some of the procedural
3 history of this case to get a full
4 understanding here to add to what
5 Mr. Freeman has already talked about.

6 So, obviously, as you know, this
7 case arrived about a motor vehicle
8 accident. The accident actually
9 occurred back in July of 2018.

10 I got involved in this case pretty
11 late, sort of as the statute of
12 limitation was approaching, and filed
13 suit in July of 2021. I served
14 Mr. McLeod, the at-fault driver,
15 through process server. The affidavit
16 of service was filed with the Court.
17 That's Exhibit A to the memorandum.

18 I also, at that time, served what
19 was believed to be the purported UIM
20 carrier, Onyx, the initial carrier that
21 issued the policy through the
22 Department of Insurance in August of
23 2021. That service was also filed with
24 the Court. It's Exhibit B to the
25 memorandum.



1 In response to the service on
2 Onyx, I received an e-mail confirmation
3 from a claims adjustor with North
4 America Risk Services, who was the
5 third-party administrator of Onyx.
6 I've attached that e-mail as Exhibit C
7 to the memorandum.

8 And basically it just said that
9 Onyx had received a copy of the summons
10 and complaint and notified me that
11 there was a liability coverage with
12 GEICO. I didn't hear any more from
13 Michelle Arlan, the claims adjustor, or
14 anyone at North America Risk Services
15 following that time period, so I
16 proceeded forward with litigation
17 against the liability carrier at that
18 point.

19 About a year later after working
20 up the damages portion of the claim and
21 kind of seeing the exposure, the
22 potential exposure of the claim, I
23 tried to get the UIM carrier back
24 involved in the case.

25 And so I did some research and I



1 learned that Texas Insurance had
2 assumed Onyx Insurance. So I sent
3 another copy of the pleadings through
4 the Department of Insurance to Texas
5 Insurance in September of 2022. That
6 acceptance of service was filed with
7 the Court and it's Exhibit D to the
8 memorandum.

9 I also, at that same time, sent a
10 copy of the pleadings by certified mail
11 directly to Texas Insurance on the
12 address they had listed on the
13 assumption certificate that was made a
14 part of Mr. Kleuchenia's UIM policy. I
15 received the return receipt that signed
16 by a Mr. Chris Sheets in September of
17 2022, and that's Exhibit E to the
18 memorandum.

19 Despite that service, I never
20 received -- or I never heard anything
21 from Texas Insurance, never got an
22 e-mail, never got a phone call.
23 Clearly, they didn't forward the
24 pleadings to an attorney. Nobody filed
25 a notice of appearance. I didn't hear



1 anything. So I kept going forward with
2 litigation against the liability
3 carrier at that point. And eventually,
4 we resolved the liability portion of
5 the claim on a covenant not to execute.

6 After settlement with the
7 liability carrier, I filed a motion for
8 summary judgement and a motion for an
9 order of reference that was heard by
10 Judge Curtis in August of 2023, which
11 I'll talk about little bit more in a
12 minute here.

13 But Judge Curtis granted those
14 motions and referred the case over to
15 you to hear the issue of damages. I
16 did file an offer of judgment at some
17 point in the amount of \$50,000, which
18 was UIM coverage, that was not
19 accepted. And then at some point, the
20 case was set for a damages trial in
21 April of this year.

22 Once we had a date for the damages
23 trial, I did send a letter directly to
24 Texas Insurance, the same address that
25 was listed on the assumption



1 certificate by First Class Mail.

2 That's Exhibit F and Exhibit H to the
3 memorandum, and still received no
4 response to that letter.

5 And as you know, no appearance was
6 made at the damages trial. So the case
7 was tried on the issue of damages. An
8 order was entered on June 4th and
9 judgment was entered that same day.
10 After that initial judgment, I filed a
11 motion for costs and interest, which
12 was heard without a hearing and ruled
13 on July 2nd, and the judgment was
14 amended that same day as well.

15 After that final judgment of July
16 2nd, I sent a copy of the judgment to
17 Texas Insurance by certified mail to
18 the same address that I had previously
19 sent the pleadings to that were signed
20 by Chris Sheets and to the same address
21 that I had sent the notice letter to
22 and I received a certified -- a
23 certified receipt signed by the same
24 individual, Chris Sheets.

25 And I finally got a response from



1 Texas Insurance. Their initial
2 response is Exhibit I to the memo.
3 They sent a letter to me on September
4 4th of 2024. And in their initial
5 letter, they allege that they never
6 receive copies of any summons and
7 complaint in this case.

8 I think there's been some
9 discovery in the federal case that
10 maybe, you know, would indicate that
11 that's different, but I won't speak for
12 Mr. Freeman or his client on what they
13 did or did not receive. I will just
14 kind of concentrate on what I did.

15 After that initial letter, five
16 days later, I received another letter
17 from Texas Insurance making a tender of
18 \$25,000, which Texas Insurance
19 represented to be the full UIM policy.
20 This motion was then subsequently filed
21 and I filed a claim for bad faith and
22 breach of contract. And then after
23 filing that case, Texas sent a tender
24 of \$50,000, which is the UIM coverage
25 policy.



1 And so that kind of brings us to
2 where we are procedurally on the case
3 at this point.

4 As Mr. Freeman indicated, their
5 motion to vacate would be under
6 Rule 60, obviously. You know, I always
7 try to simplify things as much as I
8 can. So it seems the issue for this
9 motion is whether or not there's some
10 duty for a plaintiff to continue to
11 serve documents on a UIM carrier who
12 has been served with pleadings and has
13 failed to appear. And I think the
14 clear language of Rule 5 says there is
15 no such duty to do that.

16 I think Mr. Freeman and I,
17 respectfully, we have a different
18 interpretation of the reading of
19 Rule 5, that I will get to in a minute.
20 But if there is no such duty to
21 continue to serve subsequent documents,
22 then, quite frankly, there could be no
23 fraud, there could be no mistake, there
24 could be no voidable judgment under
25 Rule 60, and the judgment has to stand.



1 So, I guess, let me start getting
2 into the law of the case. I think with
3 UIMs, the best place to start is always
4 the UIM statute that Mr. Freeman has
5 already kind of hit on and given his
6 interpretation of. And it seems to me,
7 clearly, that the UIM statute requires
8 service on the UIM carrier and gives
9 them 30 days after service of process
10 on it in which to appear.

11 Just as any other defendant, UIM
12 carrier gets served, they got 30 days
13 to appear and defend their interest.
14 That is clearly set forth in the
15 William versus Selective Insurance
16 Company Case 315 S.C. 532. It clearly
17 states the intent of Section 38.77.160
18 is to protect an insurance carrier's
19 right to contest its liability for
20 underinsured benefits.

21 Clearly based upon the proof of
22 services that have been filed the
23 Court, Texas Insurance was served.
24 They were served multiple times. They
25 signed for service and received. So I



1 don't think there is any dispute that
2 Texas Insurance was served with the
3 pleadings and they failed to appear.
4 And they have only now appeared after
5 this final judgment.

6 It's a little confusing to hear,
7 you know, the notion that the UIM
8 statute -- I don't want to put words in
9 Mr. Freeman's mouth by any means --
10 that it's discretionary in nature. I
11 understand the argument. But the fact
12 of the matter is, Texas Insurance is
13 now here trying to protect its
14 interests after a final judgment had
15 been entered.

16 So it's clearly electing to appear
17 in this case and protect its interest,
18 it's just doing so at a period of time
19 that's unfavorable to them. So I think
20 the statute is clear on its face that
21 after receiving the pleadings, they had
22 30 days to appear and they did not do
23 so in clear violation of the UIM
24 statute.

25 I'll move along to the offer of



1 judgement and the law concerning offer
2 of judgment, as Mr. Freeman pointed
3 out. We have a statute, 15.35.400 and
4 Rule 68. Both of those are clear that
5 an offer of judgment has to served in
6 accordance with the South Carolina
7 Rules of Civil Procedure.

8 The statute clearly states and the
9 paragraph states, "Service has to be
10 done in accordance with the services
11 rules for motions and other pleadings
12 set forth in the South Carolina Rules
13 of Civil Procedure." That's Rule 5.

14 Rule 5 requires service that's
15 in -- that meets the standard of the
16 statute. Likewise, Rule 68, offer of
17 judgement, goes on and states, "Service
18 of the offer of judgement shall be made
19 as provided in these rules." Again,
20 that's Rule 5.

21 So if you look at Rule 5,
22 Subsection A, the title of it pretty
23 telling. It says, service, when
24 required, and it goes on to list an
25 itemized 10 or 11 documents. Number 3,



1 written motions, Number 4, written
2 notices, Number 8, offers of judgment.
3 And it states, "Shall be served upon
4 each of the parties of record."

5 And that's key language,
6 Mr. Buffington. It doesn't say the
7 party's in default or whatever. It
8 says parties of record. The language
9 is very clear that service only has to
10 be made on the parties of record.

11 Clearly, Texas Insurance was
12 served in this case. As Mr. Freeman
13 said, they never made themselves a
14 party of record. And under the clear
15 language of Rule 5, no further service
16 is required of Texas Insurance.

17 I believe just -- while I won't
18 say that this issue has been directly
19 addressed by the Court, I do believe
20 that it was somewhat indirectly
21 addressed already, and what I mean by
22 that is, as I mentioned, after I
23 resolved the liability portion of the
24 claim with the liability carrier, I
25 filed a motion for summary judgment



1 with the Court and a motion for an
2 order of reference.

3 Those were heard on August 7th,
4 2023 by Judge Curtis. And in that
5 proceeding, I was very forthcoming with
6 Judge Curtis on laying out the
7 procedural history of the claim, the
8 fact that Texas had been served with
9 pleadings and had not appeared. I --
10 with her the fact that those motions in
11 front of her had not been served on
12 Texas because Texas Insurance had not
13 appeared in the case.

14 My position was, and I explained
15 it to Judge Curtis as I'll explain it
16 to you, I'm not aware of any authority
17 in South Carolina that's allowed a
18 Court to enter a judgment directly
19 against a UIM carrier, including a
20 default judgment. If there were such
21 authority, Mr. Buffington, certainly I
22 would have asked you to enter a damages
23 award directly against Texas Insurance.

24 But I'm not aware of any authority
25 that a Court can enter a judgement



1 directly against the UIM carrier. The
2 UIM carrier steps into the shoes of the
3 named defendant and they are not a
4 named party to the case.

5 Being that, my approach to the
6 case was to treat them as party who had
7 not appeared. I had the issue of
8 liability resolved with the Court and
9 referred over to a special referee to
10 be awarded for damages.

11 Judge Curtis heard the issue in
12 full and ruled on those motions knowing
13 that Texas Insurance had been served.
14 She made it clear in the order that
15 Texas Insurance had been served, and
16 she knew that they had not been served
17 with those motions.

18 That being said, to go some of the
19 language that Texas has cited in their
20 memorandum. At one point, they cite to
21 Rule 6, which regards motions. And I
22 believe that they sort of -- the
23 argument is that the notice of the
24 damages hearing wasn't served in
25 accordance with Rule 6.



1 Well, that damages hearing, it was
2 a trial. It was a full trial with
3 witnesses. It was not set on a motion,
4 so Rule 6 would not apply. If we're
5 going to treat them as a defaulting
6 party as of the date of this hearing,
7 Rule 55(b) requires three days' notice,
8 which was clearly met based on the
9 letter that was sent by the Court.

10 I think that the biggest issue
11 when it comes down to service is
12 Mr. Freeman and I, respectfully, we
13 just have a different interpretation of
14 Rule 5, which I think is very clear
15 that only required service on parties
16 of record here.

17 I did read some of the cases that
18 Texas cited to in their memo when it
19 goes to vacating judgments due to lack
20 of service or lack of notice. I read
21 every single one, Mr. Buffington, and
22 I'll tell you that not a single one of
23 those cases deals with the situation we
24 have before us, the situation where
25 someone has been served with pleadings



1 and has failed to appear or participate
2 in the case in any way.

3 If you look at those cases, every
4 single one of those cases, to some
5 extent, involved a party to the case
6 that had, in some way, shape, or form,
7 appeared in this case and participated
8 in the case. And I won't go through
9 each of those cases in detail. But
10 I'll just give you an example.

11 The case of Universal Benefits
12 versus McKinney that they cite to.
13 That was a case where Universal's
14 attorney filed a motion to be relieved.
15 The court granted that motion, and at
16 the hearing, set the case for trial.
17 And then at the roster meeting, nobody
18 showed up on behalf of Universal. It
19 came out to be that there was some
20 evidence of whether or not the order
21 granting relief had been served on
22 Universal.

23 Again, Universal had appeared in
24 the case, they had participated in this
25 case. Much different than we have here



1 where someone has been served with
2 pleadings and has failed to appear in
3 any way, shape, or form.

4 But if you bundle those cases
5 together that they cite to,
6 Mr. Buffington, what it goes to, what
7 Mr. Freeman talks about, the issue of
8 due process, whether or not due process
9 was afforded to Texas Insurance.

10 And that's what the UIM statute
11 does, it provides due process to the
12 carrier. The fact that service has to
13 be made on the carrier in accordance
14 with the UIM -- or with the UIM statute
15 gives the UIM carrier the opportunity
16 to appear and protect its interest.
17 That checks the due process box.
18 That's the purpose and intent of the
19 UIM statute.

20 I won't beat a dead horse here. I
21 ended my memorandum just sort of
22 talking about the notion of prejudice
23 to Mr. Kleuchenia's on any vacation at
24 this point. As I mentioned,
25 Mr. Buffington, we have a separate case



1 for breach of contract and bad faith
2 that's been filed that we are the midst
3 of litigating.

4 I think this motion goes to some
5 of those issues. The judgment here
6 that Texas is seeking to vacate, this
7 is a judgment that has been entered
8 against Brian McLeod as an underinsured
9 motorist carrier. What damages Texas
10 may be responsible for as a result of
11 that judgment that has been entered
12 against Mr. McLeod, those are all
13 issues that need to be flushed out in
14 the ensuing breach of contract and bad
15 faith claim that we have.

16 I did, you know, include a section
17 of my memorandum that talks about
18 relief under Rule 60(b)(1) as far as
19 mistake. It doesn't appear that Texas
20 is really alleging any type of mistake
21 on their behalf that would warrant
22 vacation or relief. I still don't see
23 any explanation in the memorandum or
24 the affidavit filed by Mr. Silver as to
25 why they didn't appear after receiving



1 the pleadings.

2 It seems that, you know, to the
3 extent that they are alleging some type
4 of mistake, it would be a mistake on my
5 behalf for not serving them. But that
6 would go against the argument I just
7 outlined in Rule 5, only requiring the
8 service of documents on parties of
9 record. So Rule 60(b)(1) would not
10 provide relief under that
11 circumstances.

12 I'm happy to answer any questions
13 that you have, Mr. Buffington. Again,
14 I think I've outlined it. I have been
15 pretty in depth in my memorandum, so I
16 don't want to be redundant. But it is
17 somewhat the nature of the beast here.

18 MR. FREEMAN: You're muted.

19 THE COURT: Thank you,
20 Mr. Williams.

21 Mr. Freeman, let me ask you a
22 question.

23 So the initial -- are you
24 disputing -- or is Texas Insurance
25 disputing they were not initially



1 served with the pleadings through the
2 South Carolina Department of Insurance?

3 MR. FREEMAN: Now, it appears,
4 based on a review of the records of the
5 Department of Insurance, that they were
6 served. I mean, that is proof of
7 service with the Department of
8 Insurance.

9 The issue -- you know, there's a
10 -- unfortunately, we tag a lot of rules
11 on the way around the bases on this
12 issue. But I think what it all comes
13 down to is the offer of judgment
14 itself. And I can -- I can argue this
15 two ways.

16 One, is, you know, a strict
17 reading of the rules required service
18 of an offer of judgment on the offeree.
19 In the rules and the statute, there's
20 no -- there's no dispute about that.

21 But from a common sense
22 standpoint, if you're going to hold
23 someone potentially liable for costs
24 and interest for rejecting an offer of
25 judgment, common sense says you have to



1 give the offer of judgment to them
2 first. And that wasn't done here.
3 There's no dispute here that Texas
4 never received the offer of judgment,
5 that they are, you know, apparently
6 being held to.

7 And if I can just address a couple
8 of things that Jared raised in his
9 arguments. You know, due process is
10 not something that you check off once
11 during the case and then you have no
12 more responsibilities for due process
13 afterwards. Due process requires that
14 all of the rules be -- be observed
15 during the course of litigation, and
16 that includes the service rule, and
17 that's Rule 5 and 6 that Jared talked
18 about a little bit.

19 But what he's doing, I think, and
20 where we differ in our interpretation
21 of Rules 5 and 6 is he's conflating
22 Texas Insurance with a defaulted party,
23 which Texas is not in this case.
24 Texas, again, was never a party in this
25 case and has never been in default.



1 Therefore, the language under
2 Rule 5 about not having to serve
3 defaulted parties -- because the rule's
4 very specific, a party in default who
5 has not made an appearance in the case,
6 you don't have to serve them various
7 papers.

8 Now, that rule is in direct
9 conflict with the statute on the offer
10 of judgment, which says that the
11 offeree himself, regardless if he has
12 an attorney or not -- he can be served
13 through his attorney, but if he doesn't
14 have an attorney, he has to be served
15 directly with the offer of judgment.

16 Jared raised -- Mr. Williams
17 raised a couple of issue about, you
18 know, what was served on Texas and what
19 was not. I want to be very clear, the
20 one thing that we can say Texas was
21 served with was the summons and
22 complaint through the Department of
23 Insurance.

24 Now, he has sent, also, a copy of
25 the summons and complaint directly to



1 Texas, and he sent that certified mail
2 and he has delivery confirmation and
3 signature for that. That's it.

4 You know, we've got, then, by
5 regular mail, eight days before the
6 hearing, a notice of the April damages
7 hearing, the original April damages
8 hearing, which, again, we're not
9 disputing the award of damages against
10 Mr. McLeod.

11 But the service of the notice of
12 that hearing sent eight days before via
13 First Class Mail, not certified mail,
14 doesn't state a time or a place for the
15 hearing. It merely says that the
16 hearing's going to occur on the 9th and
17 that, you know, Bobby Buffington is
18 going to be the special referee.

19 It doesn't contain the
20 requirements of notice of a place,
21 time, or even scope of what the hearing
22 is supposed to be about. It doesn't
23 say what the hearing is going to be
24 about. And, you know, does not -- does
25 not conform with the ten days' notice



1 that they should have been afforded.

2 You know, the issue of what was
3 paid and when by Texas Insurance to
4 Mr. Kleuchenia is a side issue that
5 really doesn't have anything to do with
6 the case. I can tell you, the reason
7 for the original tender of 25 was the
8 carrier has 25/50 limits on their UIM,
9 and when asked why the demand was 50,
10 there was no response.

11 It wasn't until later that Texas,
12 in looking at the endorsements and the
13 vehicles that were removed and added to
14 the policy during the course of the
15 policy, figured out that there was a
16 second vehicle on the policy and that
17 Mr. Kleuchenia would be entitled to
18 stack that coverage.

19 At which point in time, they
20 tendered the addition 25, admitting
21 that, hey, we realized that there is
22 another vehicle on this policy and
23 you're entitled to stacked. Here's the
24 remainder of the amount.

25 You know, a lot of that could have



1 been short circuited had there been
2 some additional communication, which I
3 think is the issue in this case, not a
4 lot of communication with Texas
5 Insurance that probably could have
6 streamlined the process. And any
7 potential, through, you know, not
8 conceded, you know, prejudice to
9 Mr. Kleuchenia in not having these
10 proceeds at hand.

11 Now, Jared -- Mr. Williams did
12 state, towards the end of his argument,
13 that there's been no explanation about
14 why Texas didn't appear. I don't
15 believe the law requires the UIM
16 carrier, either A, to appear, or B, to
17 provide an explanation about why they
18 don't appear.

19 I think the case law is extensive
20 case law on UIM coverage along with the
21 statute and along with the Department
22 of Insurance note that I referenced
23 earlier says that, you know, this is an
24 optional -- this is an optional duty --
25 not duty. It's optional on the



1 underinsured motorist carrier.

2 Now, when we look at what the
3 underinsured motorist carrier gives up
4 by not making an appearance, the
5 underinsured motorist carrier gives up
6 the ability to defend the defendant on
7 liability and to argue against the
8 damages awarded to the -- against the
9 at-fault party.

10 And, again, that is not what Texas
11 is doing here in this motion at all.
12 They're not trying to now go litigate
13 the defense of the defendant or the
14 damages awarded to the defendant based
15 on the accident at issue in the case.

16 This is a very limited issue,
17 limited only to the extra damages that
18 were awarded on the offer of judgment,
19 which, again, Texas never had a
20 meaningful opportunity to evaluate, to
21 accept, or to reject. And, again,
22 that's the basis of our motion.

23 Again, I'm happy to answer any
24 questions, if there are any.

25 THE COURT: Thank you.



1 Mr. Williams, anything in reply?

2 MR. WILLIAMS: Very, very quickly.

3 You mentioned earlier that it
4 seems Mr. Freeman and I, respectfully,
5 just a different reading of Rule 5, and
6 I think it's very clear, Mr. Freeman,
7 you know, seems to indicate that I'm
8 reading Rule 5 and treating Texas
9 Insurance as a defaulting party.

10 And, respectfully, that's not what
11 I'm doing, Mr. Buffington. I'm
12 treating Texas Insurance as a nonparty
13 of record, someone who's been served
14 and didn't file an appearance in the
15 case and make themselves a party of
16 record. And that's exactly what the
17 language of Rule 5 says. It's very
18 clear, "Shall be served upon each of
19 the parties of record."

20 That means the entity that filed
21 an appearance, intervened in the case,
22 and made themselves a party. If they
23 do not do that, there is no requirement
24 to continue to serve them with the
25 documents listed under Rule 5.



1 I'm not aware of any case law
2 that's been cited to that would require
3 that. It -- the plain language of
4 Rule 5 is clear. Likewise, with the
5 offer of judgement statute and Rule 68.
6 Both of those are very clear that
7 service has to be done to the extent
8 that the Rules of Civil Procedure
9 require them.

10 And if we're having a strict
11 reading of the statute, as Mr. Freeman
12 said, technically, the offeree in this
13 case is Mr. McLeod because that's who
14 the judgment is taken against. It
15 doesn't get entered directly against
16 the UIM carrier.

17 But, nevertheless, the statute and
18 Rule 68 are very clear that service has
19 to be done in accordance with the Rules
20 of Civil Procedure, which is Rule 5.

21 And, again, going back to the
22 damages notice that was sent,
23 Mr. Freeman keeps citing to Rule 6,
24 which applies to a motion. That
25 hearing was not set on any motion. It



1 was a damages trial. There was no
2 motion filed for that, so Rule 6 did
3 not apply to that.

4 Again, if we're going to be treat
5 them as a defaulting party, three days
6 notice that's listed under Rule 55(B)
7 was provided.

8 Let me check my notes.

9 The last thing I'll say is, you
10 know, there's been some mention that
11 the UIM carrier's willingness or right
12 to appear is discretionary. I guess I
13 have a little bit of a difficult time
14 understanding that. Maybe there's some
15 language that would allow Mr. Freeman
16 to argue that.

17 But what is not discretionary is
18 the UIM carrier's duty of good faith
19 and fair dealing to handle UIM claims.
20 Whether it's discretionary, they chose
21 not to, they choose not to at their own
22 peril. So I don't know if that's
23 really relevant in this case.

24 Again, I think to simplify the
25 issue, it's whether or not Rule 5



1 requires Mr. Kleuchenia to continue to
2 serve documents on Texas Insurance
3 after they've been served with
4 pleadings, and by their own discretion,
5 even so, have chosen not to intervene
6 in appearing in this case, and there is
7 no such requirement.

8 I'll leave it at that,
9 Mr. Buffington.

10 THE COURT: Thank you.

11 Mr. Freeman, anything else from
12 your?

13 MR. FREEMAN: Yeah. I just want
14 to address a very limited issue of this
15 Rule 5 argument. So in just looking at
16 the language of Rule 5, which I've got
17 up on my screen, I'm happy to share if
18 anyone needs it. But Rule 5(A) says,
19 you know, "Unless otherwise ordered by
20 the Court, because of numerous
21 defendants or other reasons, all" --
22 and then the enumerated documents which
23 include a number of the things we're
24 talking about here -- "Shall be served
25 upon each of the parties of record."



1 And I think that's -- that's where
2 Mr. Williams' argument is.

3 Then it goes on to say, "No
4 service need be made on the parties in
5 default for failure to appear," which,
6 again I think were being conflated at
7 some points in time with a defaulted
8 party, and at other points, were not.

9 Then it goes on after that to say,
10 "Except that pleadings asserting or new
11 or additional claims for relief against
12 them shall be served upon them in the
13 manner provided for serving of summons
14 in Rule 4 and notice of any trial on
15 hearing on unliquidated damages shall
16 also be given to parties in default."

17 So, again, I know it's -- at
18 times, we're being treated like a party
19 in default, at times, we're not. But
20 in any event, a request for costs and
21 interest on an offer of judgment that
22 was never served on the offeree is a
23 pleading asserting new or additional
24 claims for relief against them.

25 And in any event, that should have



1 been served, under Rule 5, on Texas
2 Insurance.

3 And that's all I would want to add
4 to this discussion.

5 THE COURT: Thank you.

6 I think what I would like for
7 y'all to do to is to submit the
8 proposed orders. That will be the
9 easiest way for me to -- I think you
10 can probably use your motions as a
11 template for that. It'd be easier for
12 y'all to do that than for me to do
13 that.

14 As far as time to do that, I know
15 we've got the holidays coming up. It
16 would be nice if we could get this
17 resolved prior to the end of the year.

18 Is two weeks enough time for y'all
19 to submit proposed orders?

20 MR. FREEMAN: That should work for
21 me.

22 THE COURT: That would be, I was
23 thinking Friday, December the 20th.

24 MR. WILLIAMS: I think so.

25 THE COURT: All right. If y'all



1 will do that, I've got some time over
2 the Christmas week that I'll be in my
3 office and I'll make every effort I can
4 to issue a ruling before the end of
5 December.

6 MR. WILLIAMS: All right. Thank
7 you very much.

8 MADAM COURT REPORTER: Before
9 anybody gets off, does anybody need a
10 copy of this transcript?

11 MR. WILLIAMS: I don't at the
12 moment. Can I get your information,
13 though?

14 (Hearing concluded at 9:55 a.m.)
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1 H E A R I N G
2 C E R T I F I C A T E

3
4 STATE OF SOUTH CAROLINA:
5 BEAUFORT COUNTY:

6
7 I, Naomi McCracken, Court Reporter and Notary
8 Public in and for the above county and state, do
9 hereby certify that the foregoing hearing was
10 taken before me at the time and place
11 herein-before set forth; that thereupon the
12 foregoing testimony was later reduced by
13 computer transcription; and I certify that this
14 is a true and correct transcript of my
15 stenographic notes so taken.

16 I further certify that I am not of counsel to
17 either party, nor interested in the event of
18 this cause.

19
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Naomi McCracken

Naomi McCracken

Court Reporter

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Viktar Kleuchenia,

PLAINTIFF,

v.

Brian McCleod,

DEFENDANT.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2021-CP-26-04596

**Texas Insurance Company's
Motion to Reconsider**

TO: JARED C. WILLIAMS, ATTORNEY FOR VIKTAR KLEUCHENIA:

YOU WILL PLEASE TAKE NOTICE that, pursuant to Rule 59(e), SCRPC, Texas Insurance Company will move before the Presiding Judge of the Fifteenth Judicial Circuit, Horry County, at such time as the Court may designate, to reconsider, alter, or amend pursuant to Rule 59(e), SCRPC, the Order issued by the Special Referee Robert Buffington on February 27, 2025 (hereinafter, the "Order"). The grounds for this motion are:

1. The court incorrectly interpreted S.C. Code § 38-77-160 as mandating an appearance by the UIM Carrier in order to preserve its due process rights to service and notice of an offer of judgment and hearing on regular or special damages.
2. The court incorrectly concluded that Texas Insurance Company was not a "party of record" as contemplated under Rule 5, SCRPC and failing to find that Texas Insurance Company became a party of record upon service of the summons and

complaint, and upon submission to the court of the “Offer of Judgment for UIM Benefits” which was specifically directed to Texas Insurance Company, but which was not actually served upon Texas Insurance Company.

3. The court failed to address Texas Insurance Company’s argument that SCRCP 5 only contemplates non-service of the documents enumerated within the rule upon parties in default. The court has already acknowledged that Texas Insurance Company was not and is not in default in this action. SCRCP 5 provides inherent protections in the event of a party’s default, which requires pleadings asserting new or additional claims for relief against them to be served in the manner provided in SCRCP 4 and requires the provision of notice of any trial or hearing on unliquidated damages. Therefore, court’s ruling treats Texas Insurance Company as a defaulting party who requires no service of the designated documents under SCRCP 5 (inclusive of offers of judgment and written notices), but fails to afford Texas Insurance Company the protections otherwise afforded to defaulting parties of service of pleadings asserting new or additional claims for relief, as well as notices of hearings on damages. This result is manifestly unjust and inconsistent under the Rules.
4. The court’s interpretation of Rules 5 and 6, SCRCP was incorrect and would lead to the inequitable and constitutionally improper result that Texas Insurance Company is not entitled to any protections under constitutional due process. Instead, the effect of the court’s order creates a category of litigant that is neither (1) a “non-party,” against whom damages cannot be awarded; (2) a “party of

- record” who would otherwise be entitled to service under SCRCP 5; nor (3) a “party in default” who would be entitled to service of an offer of judgment, a subsequent motion for costs and interest and notice of the special damages hearing. The effect of this categorization is that Texas Insurance Company, a non-party and non-tortfeasor has become subject to the court’s jurisdiction for an award of damages against it, on an “Offer of Judgment for UIM Benefits” and a Motion for Costs and Interest with which it was never served, and an award of special damages at a hearing by this court of which it never received notice.
5. The court incorrectly applied SCRCP 6, which requires service of all motions and supporting affidavits while also failing to acknowledge the undisputed evidence in the record that neither the Plaintiff’s Motion for Costs and Interest nor the supporting affidavit of counsel were served on Texas Insurance Company, the entity against whom the offer and resulting motion were directed.
 6. The court’s conclusion under SCRCP 5 that the “Offer of Judgment for UIM Benefits” need only be served on a “defendant” or “party of record” is erroneous based upon the plain language of S.C. Code § 15-35-400. Furthermore, the court failed to address whether (1) the “Offer of Judgment for UIM Benefits” was actually served on the named defendant in this action, (2) whether the named defendant in this action had the power to accept or deny an “Offer of Judgment for UIM Benefits,” and, (3) does the failure to serve the “Offer of Judgment for UIM Benefits” on the named defendant or his counsel in this action as required under SCRCP 68 and S.C. Code § 15-35-400, invalidate the award of special

damages based thereupon.

7. The court incorrectly concluded that the Plaintiff's due process obligations are satisfied upon service of the summons and complaint, and that such due process obligations are not a continuing duty, in particular where a non-party to the litigation is purportedly being subject to an award of special damages.
8. The court incorrectly applied *Williams v. Selective Insurance*, 315 S.C. 532, 446 S.E.2d 402 (1994), for the proposition that a UIM Carrier waives its rights by electing not to appear to contest the liability of the defendant. Furthermore, the court incorrectly applied this case regarding, or otherwise failed to address Texas Insurance Company's position that it was not required to appear in the matter because Texas Insurance Company does not contest (1) the admission of liability by the named defendant, (2) the amount of the underlying damages award, or (3) Texas Insurance Company's liability for UIM benefits pursuant to and within the limits of its Policy.
9. The court's conclusion regarding service improperly conflates the award of damages under the liability claim of the Plaintiff against the Defendant with the award of special damages against Texas Insurance Company under the "Offer of Judgment for UIM Benefits" and the Motion for Costs and Interest. Texas Insurance Company's election not to appear and assume the defense of the case admittedly may act as a waiver of its rights to defend the liability of the putative at-fault defendant and the award of damages against that defendant. It does not however operate as a waiver of Texas Insurance Company's rights to notice and

- service of an “Offer of Judgment for UIM Benefits” a subsequent Motion for Costs and Interest, or a resulting hearing for the purpose of awarding special damages which are outside the scope of the original complaint against the putative at-fault defendant.
10. The court’s interpretation of S.C. state law and procedural rules effectively abrogate the U.S. Constitutional due process rights of Texas Insurance Company and would be a violation of the Fourteenth Amendment of the U.S. Constitution which states that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State derive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.”
 11. The court failed to address Texas Insurance Company’s position that it is entitled to relief under SCRCP 60(b) that the judgment is void, because it was made without due process of service and notice against Texas Insurance Company, which did not have a meaningful opportunity to consider, evaluate and accept or reject the offer and/or present an argument in opposition to the award of special damages.
 12. The court failed to address Texas Insurance Company’s position that it is entitled to relief under SCRCP 60(b), on the grounds that failure to serve the “Offer of Judgment for UIM Benefits” on any party or entity to whom it was directed was an extrinsic fraud on the court, which deprived Texas Insurance Company a meaningful opportunity to be heard on the issues and for the court to make a

reasoned ruling on the Motion for Costs and Interest.

13. The court failed to address that the “Offer of Judgment for UIM Benefits” specifically states that the Plaintiff “hereby makes the following Offer of Judgment to Texas Insurance Company as assignee of Onyx Insurance Company, as UIM carrier” in accordance with S.C. Code § 15-35-400 and SCRCF 68, but that the Plaintiff regardless failed to serve or otherwise notify Texas Insurance Company of the offer.
14. The court incorrectly concluded that Texas Insurance Company did not have a “meritorious defense” thereby precluding relief under SCRCF 60(b)(1). The meritorious defense in this case is that Texas Insurance Company would have timely paid its UIM benefit obligation under the Policy upon notice of the damages award in the underlying action. Instead, Plaintiff failed to serve or otherwise notify Texas Insurance Company of the “Offer of Judgment for UIM Benefits” and the Motion for Costs and Interest in an attempt to elicit an award of special damages against Texas Insurance Company in abrogation of the applicable insurance policy.
15. The court failed to address whether the failure to serve of the “Offer of Judgment for UIM Benefits” and failure to provide notice of the hearing as to special damages arising out of the “Offer of Judgment for UIM Benefits” would be a violation of Texas Insurance Company’s due process rights, irrespective of the court’s position on waiver under S.C. Code § 38-77-160.
16. The court failed to address whether the notice of damages hearing that Plaintiff

- alleges he served on or about April 1, 2024, was sufficient under SCRCP 5 and 6, both with respect to sufficiency of time of the notice and sufficiency of substance of the notice, as it was purportedly sent via regular mail to Texas Insurance Company eight (8) days before the hearing and without provision or prior service of the motion and/or supporting affidavits.
17. The court failed to address Texas Insurance Company's argument that S.C. Department of Insurance Bulletin 4-89 correctly interprets the UIM statute to afford the UIM Carrier the right, but not the ordinary duty, to appear or defend in a lawsuit against a putative at-fault driver, thus making appearance in an action by the UIM carrier optional rather than mandatory.
 18. The Court failed to address Texas Insurance Company's argument that the language of S.C. Code § 15-35-400 requires service upon the "offeree himself" and not upon a "party" or a "defendant."
 19. The court failed to acknowledge or otherwise address that the award of damages pursuant to SCRCP 68 and S.C. Code § 15-35-400 ostensibly allows the Plaintiff to recover from the "offeree" who is Texas Insurance Company, a non-party to the litigation and not a potential tortfeasor in this action.
 20. The court failed to address Texas Insurance Company's argument that the language of S.C. Code § 15-35-400 explicitly states that it shall not be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees or other monies in accordance with the provisions of any written contract between the parties to the action, and therefore any award of special

damages pursuant to an Offer of Judgment cannot change the terms of the Plaintiff's insurance contract.

21. The court's ruling creates an inconsistency by treating Texas Insurance Company alternatively as a "non-party," a "party of record" and/or "a party in default," without any of the rights that would be afforded to Texas Insurance as either a "non-party," a "party of record," or a "party in default" with respect to service, notice and jurisdiction of the court.
22. The court failed to address the personal and subject matter jurisdictional basis for awarding damages ostensibly against a non-party to the litigation. Texas Insurance Company is not a potential tortfeasor in this action and therefore the award of special damages against it is an improper exercise of the court's jurisdiction.

Accordingly, Texas Insurance Company respectfully requests that the court reconsider the arguments asserted by Texas Insurance Company in its Motion to Vacate, including those raised in its supporting memorandum and oral argument and as otherwise outlined above, and issue an order granting Texas Insurance Company's Motion to Vacate and withdrawing the Court's award of costs and interest.

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ATTORNEYS FOR TEXAS INSURANCE
COMPANY, AS SUCCESSOR OF ONYX
INSURANCE COMPANY, INC., A RISK
RETENTION GROUP

March 4, 2025
Beaufort, South Carolina

CERTIFICATE OF SERVICE

On March 4, 2025, I served *Texas Insurance Company's Motion to Reconsider's* pursuant to Rule 5, SCRCP by depositing it in the United States mail, with postage prepaid, and addressed as follows:

Jared C. Williams
Law Offices of Jared C. Williams
PO Box 403
Mount Pleasant, SC 29456

Re:
2021-CP-26-04596

s/ Anna J Beckham
Anna J Beckham

Beaufort, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	CASE NO.: 2021-CP- 26-04596
VIKTAR KLEUCHENIA,	)	
	)	
Plaintiff,	)	PLAINTIFF’S MEMORANDUM IN
	)	OPPOSITION TO TEXAS INSURANCE
v.	)	COMPANY’S MOTION TO
	)	RECONSIDER
BRIAN MCLEOD,	)	
	)	
Defendant.	)	

Plaintiff Viktor Kleuchenia (“Plaintiff”) submits this Memorandum in Opposition to Texas Insurance Company’s (“Texas Insurance”) Motion to Reconsider. Texas Insurance has not, and cannot, show that the Court erred in denying its Motion to Vacate Judgment. Instead, Texas Insurance merely expresses dissatisfaction with the Court’s Ruling, which is insufficient grounds for relief under Rule 59(e), *SCRCP*. Moreover, Texas Insurance misinterprets certain provisions of the Court’s Order and raises for the first time several grounds in its Motion to Reconsider which were not initially raised in its Motion to Vacate.

STANDARD OF REVIEW

Rule 59(e), *SCRCP*, provides a motion to alter or amend judgment and preserve the record for appeal. Pelican Building Centers v. Dutton, 311 S.C. 56, 427 S.E.2d 673, 675 91991). The purpose of a Rule 59(e) motion is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 673, 675 (1993). A party cannot raise an issue for the first time in a Rule 59(e) motion which could have been raised at trial. MailSource, LLC v. M.A. Bailey & Assoc. Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003).

LEGAL ARGUMENT

I. THE COURT PROPERLY DENIED TEXAS INSURANCE'S MOTION TO VACATE.

While a summary of the procedural history is fully set forth in the Court's Order Denying Texas Insurance's Motion to Vacate, and need not be rehashed herein, the Court properly denied Texas Insurance's Motion to Vacate.

a) Rule 5, *SCRPC*, requires service of motions, notices, and offers of judgment on a "party of record."

As correctly set forth in the Court's Order Denying Texas Insurance's Motion to Vacate, the plain and unambiguous language of Rule 5, *SCRPC*, requires service of specifically enumerated documents (i.e., motions, notices, offers of judgment) on a "party of record." Texas Insurance, based on the record of the case and its own admission in its Motion to Vacate, was not a "party of record" in the case. Texas Insurance was served with pleadings (multiple times) and provided notice of the UIM claim pursuant to S.C. Code Ann. § 38-77-160 but failed to file a notice of appearance, failed to monitor the case, and failed to otherwise respond to pleadings. Texas Insurance was afforded due process and given multiple opportunities to appear and participate in the case to protect its interest. Williams v. Selective Insurance, 315 S.C. 532, 446 S.E.2d 402 (1994); see also Ex Parte: Allstate Ins. Co. v. Tixier, Opinion No. 3121, Database, (Ct. App 2000).

b) Offers of Judgment pursuant to § 15-35-400 and Rule 68, *SCRPC*, are required to be served in accordance with the South Carolina Rules of Civil Procedure.

In attempting to cite various language contained in § 15-35-400 and Rule 68, *SCRPC*, regarding offers of judgment, Texas Insurance continues to ignore the very clear and plain language contained in both which state that an offer of judgment is to be served in accordance with the South Carolina Rules of Civil Procedure. This service requirement is clearly dictated by Rule 5, *SCRPC*, as an offer of judgment is a specifically enumerated document set forth therein requiring service

on a “party of record.” Again, Texas Insurance, by its own admission, was not a “party of record” at the time the offer of judgment was filed.

c) Texas Insurance misapplies Rule 6, *SCRPC*.

Texas Insurance continues to improperly assert that Rule 6, *SCRPC*, sets forth service requirements of a motion when it does not. Rule 6, *SCRPC*, applies to time computations of motions – not service requirements – which is contained in Rule 5, *SCRPC*. Moreover, Texas Insurance continues to ignore the fact that the damages trial was not set upon motion by Plaintiff, and thus, Rule 6, *SCRPC*, does not apply to the damages trial. Nevertheless, despite the very clear and plain language of Rule 5, *SCRPC*, which only requires service of motions and notices on a “party of record,” Texas Insurance further ignores the fact that they were in fact provided notice of the damages trial held on April 9, 2024, but again failed to respond or otherwise appear.

d) Effect of Order Denying Texas Insurance’s Motion to Vacate.

Despite Texas Insurance’s assertion, the Court’s Order Denying its Motion to Vacate does not assert any award or damages directly against Texas Insurance, does not “improperly inflate” any damages award entered directly against Texas Insurance, and does not abrogate any contractual rights of any party. The Order does not conclude what damages Texas Insurance is liable for pursuant to the UIM policy and its alleged breach of contract and/or bad faith, it simply asserts damages entered against the underinsured motorist.

Respectfully submitted,



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March 17, 2025
Charleston, South Carolina

1 IN THE COURT OF COMMON PLEAS
2 FIFTEENTH JUDICIAL CIRCUIT
3 STATE OF SOUTH CAROLINA
4 COUNTY OF HORRY

5 VIKTAR KLEUCHENIA,
6 Plaintiff,

7
8
9 vs.

CIVIL ACTION NUMBER
2021-CP-26-04596

10

11

12

13

14 BRIAN McCLEOD,
15 Defendant.

16 -----/

17

18 The MOTION TO RECONSIDER HEARING via
19 videoconference in the above-entitled cause was
20 taken pursuant to Notice and agreement, before
21 Special Referee Robert Buffington and Kyle J.
22 Saniga, Certified Court Reporter and Notary
23 Public, with all parties at their respective
24 locations, on the 19th day of March 2025,
25 commencing at or about the hour of 9:02 A.M.

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25	(NO EXHIBITS MARKED.)	



1 THE COURT: This is in the case of
2 Victar Kleuchenia versus Brian McCleod
3 Civil Action Number 2021-CP-26-04596

4 We're here this morning on Texas
5 Insurance Company's Motion to
6 Reconsider.

7 So Mr. Freeman, I'll turn it over
8 to you. I have read through your
9 memorandum as well as Mr. Williams
10 response but I'll turn it over to you
11 for argument.

12 MR. FREEMAN: Thank you, Your
13 Honor, and I think, you know, I put the
14 grounds in the motion for the motion
15 for reconsideration and, you know,
16 primarily, of course, to just preserve
17 some issues for appeal.

18 So, you know, I'm not going to
19 reargue my entire motion from before.
20 If there's any points that you want
21 anymore clarification on I'm happy to
22 discuss them.

23 But in general, this motion is
24 made on the grounds that Texas
25 Insurance feels that the order denying



1 the motion to vacate failed to consider
2 certain things and also came to an
3 erroneous conclusion on a few others.

4 And I'll just run through the list
5 and briefly discuss grounds for each
6 and then turn it over to Jared.

7 If -- and I'll just over the order
8 of the motion just so everybody can
9 follow along.

10 The first grounds for this motion
11 under 59E is that we believe that the
12 Court has incorrectly interpreted SC
13 Code 3877160 which is the UIM statute,
14 which states that, you know, a UIM
15 carrier has to make an appearance
16 within 30 days in order to essentially
17 step into the shoes of the defendant
18 and protect the interests under the
19 defense of the action.

20 Our position is that, again, and
21 I'll cover some of this in subsequent
22 items, as well, our position is that
23 that statute is a permissive statute
24 not a mandatory statute. There's not a
25 lot of authority for that.



1 The only thing that that statute
2 and appearance by the UIM carrier does
3 is allows the UIM carrier then to
4 protect their interests on the issue of
5 liability and on the interest -- on the
6 issue of damages.

7 In this particular case and as
8 I'll discuss later on in the motion, as
9 well, Texas Insurance does not dispute
10 the liability of the defendant.

11 Mr. Kleuchenia offered testimony
12 and I believe an affidavit, not Mr.
13 Kleuchenia, I'm sorry, Mr. McCleod
14 offered an aft and testimony
15 essentially admitting liability in this
16 case.

17 There is no issue of liability to
18 dispute by the under insured's carrier
19 and likewise, the under insurance
20 carrier does not dispute the issues of
21 damages suffered by its insured, Mr.
22 Kleuchenia.

23 Again, the only issue that the UIM
24 carrier would dispute in this case is
25 the award of any special damages or



1 extra consequential damages from the
2 result of the offer of judgement, which
3 they weren't served.

4 Number 2, it has to do with the
5 discussion about Texas Insurance
6 Company's position as a party of
7 record.

8 I think the conclusion of the
9 Court is that Texas Insurance is not a
10 party of record because it did not
11 appear in this case.

12 The issue there is that the
13 interpretation of Texas Insurance
14 Company as a nonparty of record creates
15 a third class of litigant essentially.
16 And again, I'll discuss this a little
17 bit mor in so lower items.

18 But especially the categorization
19 of Texas Insurance Company is that they
20 -- not a party of record has created
21 this weird little gray area where I
22 guess the effect essentially is that
23 they are not entitled to service of
24 certain documents that other
25 non-parties, like a defaulted party



1 would have been entitled to.

2 We believe that that's not the
3 intent of the rules or the statute with
4 respect to the offer of judgement
5 statute and the service rules in the
6 State of South Carolina and for that
7 reason we believe that under Rule 5
8 they should be considered a party of
9 record because they were named and
10 served.

11 Number 3 has to do again with
12 South Carolina Rules of Civil Procedure
13 5, contemplates non-service documents.
14 I know Jared argued this in the
15 underlying motion.

16 It contemplates that certain
17 documents are not required to be served
18 on parties that are in default for
19 nonappearance.

20 Again, the record in this case
21 demonstrates that Texas Insurance was
22 not in default in this case.

23 And even if it were in default,
24 Rule 5 provides inherent protections
25 for parties that are in default.



1 And again, this goes to kind of
2 the item I was talking about before.
3 By creating this class of litigant that
4 is not in default but has also not
5 appeared, you've -- it takes away the
6 protections under the rules for
7 defaulted parties but it also provides
8 now in this new class of litigant that
9 Texas Insurance is somehow liable for
10 damages as a non-tort-feasor, extra
11 damages, special damages in this case
12 as a non-tort-feasor.

13 Number 4, again speaks to Rules 5
14 and 6.

15 I know in his memorandum Jared has
16 objected or raised some grounds that
17 Rule 6 isn't a proper rule to be
18 considered in this context.

19 Rule 6 is a time rule but it
20 discusses the timing of which certain
21 documents must be served. So it has to
22 be raised in conjunction with the rest
23 of the rules in order to give you all
24 the facts and certainly Rule in
25 discussing the timing for things that



1 has to be served inherently addresses
2 documents that must be served.

3 Again, this goes to the issue of
4 the creation of this kind of third
5 class litigant for Texas Insurance
6 Company, a nonparty, because, you know,
7 again, it's an insurance company not a
8 tortfeasor.

9 But in a traditional sense, a
10 nonparty can't be -- can't be award
11 damage -- damages cannot be awarded
12 against a nonparty but it's also either
13 a party of record who would be entitled
14 to service under Rule 5 or a party in
15 default who would be entitled to
16 service of the offer of judgement and
17 the subsequent motion for costs.

18 Basically what we're saying is
19 that Texas Insurance is none of these
20 things. But there is no real guidance
21 in the law for -- if Texas is none of
22 these things, then what is Texas
23 Insurance?

24 So essentially the effect of the
25 ruling is that Texas Insurance Company



1 is now a nonparty and non-tort-feasor
2 but has become subject to the Court's
3 jurisdiction for an award of damages
4 against it under the -- under the
5 motion for cost and interest for the
6 offer of judgement.

7 Number 5, again deals with South
8 Carolina 7 Rules of Civil Procedure.

9 Number 6 requires service of all
10 motions and support the affidavits and
11 the evidence in this case I think is
12 undisputed that neither the plaintiff's
13 motion for cost or interest nor the
14 supporting affidavit of counsel was
15 ever served on Texas Insurance Company.

16 And of course, you know, it's also
17 important to note and I think I discuss
18 this later on down in the motion but
19 the offer of judgement was directly --
20 was directly to Texas Insurance.

21 I mean it says in the offer of
22 judgement it's directed towards Texas
23 Insurance Company as the UIM carrier
24 but, you know, again never serving that
25 on Texas Insurance as the UIM carrier



1 is, of course, part of the problem.

2 Let's see, Number 6, South
3 Carolina Rules of Civil Procedure 5
4 that the offer of judgement only be
5 served on a defendant or a party of
6 record, I think that was the conclusion
7 the Court reached.

8 We believe that's an erroneous
9 conclusion because of the plain
10 language of the statute which requires
11 service upon the offeree itself or its
12 counsel.

13 And again, neither the offeree,
14 who is explicitly against -- to be
15 Texas Insurance Company, not the
16 defendant ever received that offer of
17 judgement.

18 And assuming under Rule 5 that an
19 offer of judgement need only be served
20 on the defendant, there isn't any
21 evidence in the record and I believe
22 actually evidence contravenes the
23 assertion that the offer of judgement
24 was served on the defendant, Mr.
25 McCleod in this case.



1 So part of our issue in terms of
2 the ruling was that the Court failed to
3 address whether the offer of judgement
4 was actually served on the defendant.

5 If the position of the plaintiff
6 is we don't need to serve it on Texas
7 Insurance Company because it's not a
8 party, it's not a defendant, it's not a
9 party of record, well, then the
10 question then becomes did you serve the
11 offer of judgement on the party of
12 record on the defendant who, you know,
13 again, is the party against whom
14 ostensibly these awarded -- these
15 damages are awarded.

16 And I appreciate Jared making that
17 I guess concession in his memorandum
18 but assuming for the facts of this
19 hearing that the plaintiff is actually
20 only seeking these damages against the
21 defendant, Mr. McCleod, you know,
22 again, there's no evidence that Mr.
23 McCleod was served with the offer of
24 judgement for UIM benefits in this
25 case.



1 There's no evidence whether the
2 defendant could accept an offer of
3 judgement for UIM benefits in this
4 case.

5 And the order failed to address
6 whether the failure of service of the
7 offer of judgement on the defendant,
8 the named defendant in the case
9 invalidates the award of the damages
10 for the costs, interest --

11 Number 7, this basically goes to I
12 think Jared's argument in a prior
13 hearing that there's basically a check
14 box for due process, the satisfaction
15 of the obligations of due process in
16 the litigation process.

17 And I think the argument of
18 counsel was that, well, we served the
19 summons and complaint and therefore due
20 process has been satisfied.

21 Our argument and the issue that we
22 have with that is that due process is
23 not a check box once and you're done.

24 Due process is a continuing
25 obligation throughout the course of any



1 litigation. And the -- simply the fact
2 that they served the summons and
3 complaint on the carrier that would
4 mean that they're exempted from any due
5 process obligations going forward
6 throughout the course of the rest of
7 the litigation.

8 Number 8 deals with the Court's
9 reliance on Williams versus Selective
10 Insurance, that's 315SC532.

11 And essentially I think in the
12 order the Court relied upon that case
13 for the conclusion that UIM carrier
14 waived its rights in this matter by not
15 -- by not appearing and contests the
16 liability of the defendant.

17 Again, the UIM carrier was never
18 going to contest the liability of the
19 defendant but the issue I think is that
20 the Williams versus Selective Insurance
21 Company case stands really for the
22 proposition that an insurance company,
23 an under insured motorist carrier
24 cannot be a defendant or a tortfeasor
25 or a liable party under our litigation



1 structure. Instead it requires that
2 the actual tortfeasor be sued.

3 And that was the issue in Williams
4 versus Selective Insurance was the
5 plaintiff had failed to bring a cause
6 of action against the nominal
7 defendant, the actual tortfeasor and
8 instead just sued the insurance company
9 for UIM benefits.

10 And the interpretation in that
11 case was the UIM carrier is not a party
12 against who damages can be awarded and
13 who can be considered a tortfeasor in
14 this sort of case.

15 And we believe that Williams
16 versus Selective Insurance stands for
17 the proposition that Texas should have
18 been awarded -- should have been
19 awarded damages on the basis of an
20 offer of judgement to the UIM carrier.

21 Number 9 again has to do with this
22 issue of damages. The -- we believe
23 that the conclusion of the order
24 improperly conflates the award of
25 damages under the liability claim with



1 the award of special damages of the
2 cost and interest under the offer of
3 judgement.

4 Again the insurance company wasn't
5 going to dispute the issue of liability
6 and wasn't going to dispute the issue
7 of the underlying actual damages.

8 And the election not to appear may
9 waive the rights of the insurance
10 company to go ahead and argue against
11 that but it doesn't operate as a waiver
12 of their rights to notice and service
13 of the offer of judgement in the
14 subsequent motion for damages on that
15 basis.

16 I think Number 10, we've basically
17 covered that in the underlying motion.
18 It just has to do with Fourteenth
19 Amendment rights of due process. We
20 believe that the interpretation of the
21 state law and rules to not require
22 service of and offer of judgement on an
23 allegedly liable party would be a
24 deprivation of due process under the
25 federal -- US constitution as well as



1 the state constitution.

2 One of the items that the
3 underlying order failed to address and
4 that we argued on the underlying motion
5 is that the judgement was void for
6 failure of service.

7 So the issue there -- and again,
8 not to reargue the underlying motion --
9 but just for a brief thumbnail sketch
10 of the position there, the issue was
11 that because the offer of judgement was
12 never served on Texas Insurance and the
13 motion for costs and interest was never
14 served on Texas Insurance, the Court
15 never had the opportunity to have a
16 meaningful dialogue with the parties
17 about what the argument was in that
18 case.

19 Texas Insurance didn't have an
20 opportunity to consider or accept or
21 reject the offer of judgement and
22 present an argument in opposition to
23 the damages that were ultimately
24 awarded in the hearing.

25 And because there was never an



1 opportunity for Texas Insurance to
2 argue that issue, the failure of
3 service of that motion and the offer of
4 judgement is an extrinsic fraud on the
5 Court, which -- which essentially just
6 means that the Court didn't have the
7 opportunity to consider all sides of
8 the argument because one party wasn't
9 able to actually assert its position in
10 that motion.

11 Sorry, I'm trying to do this
12 quickly so that we don't waste a whole
13 morning on this.

14 But Number 12, just, again, that
15 Rule 60(b) because the motion wasn't --
16 the motion and the offer of judgement
17 wasn't served on the party to whom it
18 was directed, we believe that Texas
19 Insurance is entitled to judgement
20 under 60(b) because they didn't have a
21 meaningful opportunity to be heard by
22 the Court on that motion for costs and
23 interest.

24 Another item I think that the
25 Court failed to address in its order,



1 again, was the specific wording of the
2 offer of judgement filed by the
3 plaintiff.

4 Again, under the offer of
5 judgement the plaintiff admitted he
6 states specifically the plaintiff
7 hereby makes the following offer of
8 judgement to Texas Insurance Company as
9 assignee of -- on its Insurance Company
10 as UIM carrier.

11 So the plaintiff has made this
12 offer of judgement specifically to
13 Texas Insurance Company but never
14 actually provided it to Texas Insurance
15 Company.

16 Merely filing an offer of
17 judgement we don't believe under the
18 rules or the statute is sufficient.

19 And clearly while the plaintiff is
20 attempted to make the offer of
21 judgement to Texas Insurance Company,
22 it stands to reason that they should
23 perceive it at some point in order to
24 consider it and either accept it or
25 reject it.



1 Next, the order or at least the
2 order mentions the issue of meritorious
3 defense and again, that comes with I
4 think the alternate position of Texas
5 Insurance that the ruling was the
6 result of a mistake, fraud or error.

7 And in those cases, generally,
8 you'd require a meritorious defense for
9 issues such as, you know, getting out
10 of default and that sort of thing.

11 Again, our position on that
12 primarily is that, you know, this
13 judgement is void, which doesn't
14 require a showing of meritorious
15 defense.

16 And simply just because the issue
17 of the judgement being void wasn't
18 addressed in the underlying order I
19 figured I'd throw that in just to make
20 sure it was preserved.

21 15 I think I've already talked
22 about. I think the position of the
23 Court was that Texas Insurance waived
24 its right to service of the offer of
25 judgement.



1 I think finding that they waived
2 it is one thing but discussing whether
3 or not it was a violation of Texas
4 Insurance Company's due process rights
5 is the other issue.

6 You know, I don't think we landed
7 on whether or not it was a violation of
8 their due process rights that they
9 waived by virtue of 3877160.

10 The Court didn't address in its
11 order the notice that the plaintiff
12 purportedly provided Texas Insurance
13 with respect to the hearing on the
14 damages.

15 I know that Texas Insurance
16 disputes whether they received that
17 notice but in -- irregardless of
18 whether or not they received it, the
19 notice that was provided, we don't
20 believe was sufficient under Rules 5
21 and 6 of the South Carolina Rules of
22 Civil Procedure because it was only
23 seven, eight days before the hearing
24 and it didn't have with it the motion
25 or any supporting affidavits that were



1 relied upon for the motion and it
2 didn't state a time or place for the
3 hearing either and it just simply
4 stated a date and before whom the
5 hearing would be held.

6 We don't believe that that is --
7 that is sufficient under South Carolina
8 Rules 5 and 6.

9 I know Jared, in the underlying
10 motion, argued that he's only required
11 to give I think it was three days
12 notice to a defaulted party. But
13 again, you know, we have to be careful
14 about creating this special class of
15 litigants.

16 Either Texas is a defaulted party
17 or it's just a party that hasn't made
18 an appearance yet.

19 And regardless, I think all these
20 rules state what the timeline and the
21 required content of the notice of
22 appearing is and clearly that was not
23 staffed by the notice that was sent by
24 counsel.

25 17, it just deals with the South



1 Carolina Department of Insurance
2 bulletin that I cited in the underlying
3 hearing.

4 The Department of Insurance has
5 reached the conclusion in interpreting
6 the UIM statute that it is a permissive
7 statute that they be -- the insurance
8 company is entitled to appear on behalf
9 of the defendant if the insurance
10 company wanted to dispute the issue of
11 liability or damages.

12 And I think the Department of
13 Insurance has come out historically
14 very much in favor of that position.

15 And, you know, that -- that just
16 wasn't addressed in the underlying
17 order.

18 Number 18, again, the code section
19 1535400 requires service upon the
20 offeree himself and not upon the
21 wording. I think that the plaintiff
22 has used in arguments party or
23 defendant. It requires service upon
24 the offeree himself, which in this case
25 would be Texas Insurance Company, again



1 which was not done.

2 So Number 19 -- and I know I've
3 talked a little bit about this, at
4 least touched on it -- and again, I
5 think Jared addressed this in his
6 memorandum in opposition to this
7 motion.

8 I think everyone has acknowledged
9 that the award of damages on the offer
10 of judgement and the subsequent motion
11 for costs and interest is not an award
12 against Texas Insurance Company.

13 I think that the Court and counsel
14 has conceded that the offer of
15 judgement and the damages related
16 thereto are awarded against the
17 defendant.

18 Now all that said, you know, we're
19 currently in a collateral case in
20 federal court on a DJ action and bad
21 faith claim that Texas Insurance owes
22 money above and beyond its coverage
23 limits in this case and ostensibly the
24 award of costs and interest is at least
25 a portion of, if not all of the extra



1 contractual damages that are sought in
2 that coverage action.

3 So, while I appreciate the
4 acknowledgment that the insurance
5 company who was the offeree is a
6 nonparty to the litigation and not a
7 potential tortfeasor and therefore the
8 damages aren't awarded against Texas
9 Insurance Company, it seems to me that
10 plaintiff would try to recover those
11 damages against Texas Insurance
12 Company, who again, is not a party or a
13 tortfeasor in this action.

14 So this again goes to the issue of
15 there is a special class now in which
16 we've put Texas Insurance Company where
17 they're not a party, not a tortfeasor
18 but there's an award of damages that I
19 believe the plaintiff is seeking to
20 enforce against Texas Insurance Company
21 in a collateral venue.

22 Talked a little bit about 1535400,
23 which talks about the -- nothing in
24 that statute shall be interpreted to
25 aggregate contractual rights to any



1 party concerning the recovery of
2 attorneys fees or other monies in
3 accordance with the provision of any
4 written contract between the parties to
5 the action.

6 So while this was an issue that
7 was argued it -- I don't know that it
8 was necessarily addressed that the
9 offer of judgements can't change the
10 terms of the insurance contract.

11 I think that Jared essentially
12 addressed this a little bit in his
13 memorandum in opposition of the motion
14 which basically has admitted that, you
15 know, it doesn't change the terms of
16 the plaintiff's insurance contract.

17 But again, speaking to the federal
18 court in the future, you know, this is
19 -- this the concern that there's an
20 offer of judgement that hasn't been
21 served on a nonparty that is now
22 exposed to an award of damages that we
23 believe the plaintiff's going to at
24 least attempt to enforce against the
25 insurance company.



1 21 I think just out of an
2 abundance of caution, again talking
3 about the inconsistency in the way that
4 Texas Insurance Company would be
5 treated if the Court's ruling is put
6 into effect with respect to their
7 service requirements and whether or not
8 they're a party of record, party of
9 default or a nonparty and what that
10 means for service.

11 We believe, again, Texas Insurance
12 Company should be afforded all the
13 rights of a part or at least the rights
14 of a party in default.

15 And if, in either of those cases,
16 Texas Insurance would have been
17 entitled to both service to the offer
18 of judgement and notice of the hearing
19 on the award of costs and interest.

20 22 is just a general personal
21 subject matter, jurisdictional basis
22 for awarding damages to a nonparty to a
23 litigation.

24 Again, if Texas Insurance Company
25 is considered a nonparty, is their a



1 personal and subject matter
2 jurisdiction for the Court to award
3 damages against a non-potential
4 tortfeasor and we believe that that --
5 an award against Texas Insurance is --
6 would be improper in that scenario.

7 Again, recognizing that the order
8 doesn't award the damages against Texas
9 Insurance Company but speaking to, you
10 know, the future venue of federal
11 court, well, if that's the case the
12 Texas Insurance Company shouldn't be
13 liable for the cost an interest on an
14 offer of judgement that they weren't
15 provided and didn't have an opportunity
16 to accept or consider.

17 I'm just looking at my notes. I
18 think -- I think that's basically the
19 grounds for the motion.

20 Again, you know, we would ask the
21 Court to consider the -- all of the
22 original grounds. I think I pretty
23 much covered most of them. Again, out
24 of an abundance of caution to preserve
25 the record but happy to answer any



1 questions you may have otherwise I'll
2 turn it over to Jared.

3 THE COURT: Thank you, Mr.
4 Freeman. Mr. Williams, hear from you.

5 MR. WILLIAMS: Thank you. I'm
6 going to do my best to try be brief
7 here.

8 I don't have any new arguments to
9 make that weren't addressed in the
10 initial motion to vacate.

11 I know, you know, they -- Texas
12 has filed a motion to reconsider laying
13 out I think 22 grounds it was. I'm not
14 to go through each, individually.

15 I did file a memo to try to do my
16 best to address just broad topics that
17 I fel like would cover the motion to
18 reconsider of it entirely and so I'll
19 try to kind of just broadly go through
20 some of the topics there.

21 The first topic I guess is this
22 service requirement of a motion or
23 notice of offer of judgement under Rule
24 5. Each of those, a motion, a notice,
25 an offer of judgement's, each of those



1 are separately enumerated in Rule 5
2 which requires service of those
3 documents on the party of record.

4 I think the meaning, the
5 definition of a party of record is very
6 clear. I'll just read it.

7 It's one who has made a formal
8 appearance either in person or by
9 attorney.

10 Texas Insurance, I don't think
11 there's any dispute they were served
12 with a pleading. They made no formal
13 appearance in the case until after this
14 judgement was entered.

15 Just based on the clear language,
16 plain reading of Rule 5 Texas Insurance
17 was not a party of record.

18 So the documents listed in Rule 5,
19 a motion, a notice, an offer of
20 judgement was not required to be served
21 on Texas Insurance.

22 I think at this juncture, just
23 looking at everything that's been
24 filed, there's kind of been some, you
25 know, back and forth on the position of



1 whether Texas Insurance was a party of
2 record or not a party.

3 And initially in the memorandum on
4 the motion to vacate they acknowledge
5 they were not a party to the case.

6 And looking at their motion to
7 reconsider, it's kind of gone back and
8 forth.

9 Paragraph two of the motion to
10 reconsider, they try to make the
11 argument that they were a party of
12 record simply based on service of the
13 pleadings.

14 Yet later in the same motion to
15 reconsider paragraph seven they go back
16 and acknowledge that they're not a
17 party to the case.

18 So, I think it's a little bit
19 trying to just throw something and see
20 what sticks but under the plain
21 language of Rule 5, party of record,
22 Texas Insurance, made no appearance.
23 They were not a party of record. A
24 motion, a notice or an offer of
25 judgement is not required to be served



1 under Rule 5.

2 I was trying to think of another
3 situation where maybe we've seen this
4 application of Rule 5 in practice.

5 And just, you know, looking at a
6 normal lawsuit, you know, plaintiff
7 files a pleading. They serve
8 defendant. That defendant, under Rule
9 12 has 30 days to respond just as I
10 would refer to UIM statute 3877160,
11 provide 30 days notice for the UIM
12 carrier to appear.

13 If that defendant does not appear,
14 then the plaintiff files a motion for
15 entry of judgement with the Court.

16 The plaintiff does not have to
17 serve that motion for entry of default
18 on that party because they had an
19 opportunity in the case. They're not a
20 party of record. Yet they are not in
21 default yet. Default has not been
22 entered.

23 So Texas Insurance failed to
24 understand that there is the situation
25 where somebody cannot be in default yet



1 but not be a party of record.

2 There is a middle ground and they
3 won't accept -- they want to take the
4 position that there's either one or the
5 other.

6 And I would also add that you're
7 not going to find any case law in South
8 Carolina where a person has not been
9 served with that motion for entry of
10 default had a violation of their due
11 process rights.

12 Because they had service of the
13 pleadings. You're giving them the
14 opportunity to appear in the case and
15 participate and protect their interest.
16 It's on that party to respond to the
17 pleadings.

18 I think that application has even
19 more importance here when we're talking
20 about the context of the UIM claim
21 because I -- as I've pointed out, you
22 know, the hearing on the initial motion
23 to vacate I'm not aware of any
24 authority in South Carolina where the
25 Court could enter default against a UIM



1 carrier.

2 The causes of action in the
3 complaint are alleged directly against
4 the insurance company, the UIM carrier.
5 I see no authority where the Court can
6 enter default or can enter a judgement,
7 whether it's default or monetarily
8 directly against the UIM carrier.

9 So if that's not an -- for the
10 plaintiff, while proceeding forward,
11 the UIM carrier hasn't appeared,
12 they're not a party of record to the
13 case Rule 5 requires their service of
14 additional documents on the UIM
15 carrier.

16 Looking at I guess the next topic
17 in regards to the offer of judgement
18 itself, under both the Statute 1535400
19 and Rule 68, I think what Texas
20 Insurance is doing in their arguments
21 is trying to kind of parse out certain
22 language from each of those to say that
23 plaintiff had a duty to serve the offer
24 of judgement on Texas Insurance
25 Company.



1 But what Texas Insurance is not
2 doing and what is required to be done
3 is to refocus the statute and Rule 68 a
4 whole, which clearly states that
5 service of offer of judgement has to be
6 done in accordance with the South
7 Carolina Rules of Civil Procedure,
8 which is Rule 5.

9 Rule 5 specifically includes in
10 that list of documents an off of
11 judgement applicable to service
12 required as an offer of judgement which
13 states, again, offer of judgement has
14 to be served on a party of record.

15 I'll touch on one quick topic that
16 Mr. Freeman brought up as far as
17 there's no evidence to say that the
18 offer of judgement was filed on the
19 actual defendant, Mr. McCleod.

20 Well the offer just was filed with
21 the Court. Mike Smith was the attorney
22 representing Mr. McCleod, had filed an
23 appearance in the case so he was
24 electronically served, so I don't know
25 if that's sort of an adequate argument.



1 I mean electronic service is proper
2 service under the rules of civil
3 procedure.

4 So the defendant, was, in fact,
5 served through his attorney which made
6 a formal appearance in the case.

7 In regards to I guess the reliance
8 of Rule 6 regarding notice of the
9 damages trial -- again Rule 6 doesn't
10 apply to a service required, that's
11 Rule 5.

12 Rule 6 talks about computation,
13 kind computations of a motion. Again,
14 you know, I'll point out what was
15 reiterated before, that the damages
16 trial wasn't -- by any kind of formal
17 filing written motion of myself, so
18 Rule 6 would not apply to that.

19 And then I think most importantly,
20 Texas Insurance seems to, you know,
21 continuing on the fact that notice of
22 the damage trial was, in fact, provided
23 to Texas Insurance.

24 There's a letter filed with the
25 Court on April 1st -- damages trial is



1 going to be held on April 9th. It does
2 give the time. It says it's going to
3 be held before Bob Buffington. My --
4 is included on my letterhead.

5 You know, had Texas Insurance
6 received that notice they could have
7 taken actual steps to appear.

8 I think if we're being honest and
9 candid I think Texas Insurance has a
10 mailing problem or at least, you know,
11 a problem processing mail. If they did
12 not receive that notice, that's on
13 them. It was sent to the same address
14 that the pleadings were sent to.

15 And I'll point out that initially
16 after receiving a copy of the judgement
17 the first response I got from Texas
18 Insurance was that they never received
19 a copy of the pleadings either. That
20 -- to the memorandum on the motion to
21 vacate that was previously heard I
22 think Texas Insurance has been forced
23 to back off of that position just based
24 on the proof of service that was
25 provided to Texas Insurance but since



1 the notice was sent via first class
2 mail, not certified mail, there is
3 really no proof of service.

4 So I believe Texas Insurance still
5 sees the opening to make that argument.
6 But nevertheless, notice was, in fact,
7 provided.

8 I guess lastly I'll just broadly
9 touch on the effect of both the
10 judgement and the Court's order denying
11 the motion to vacate.

12 Again, as Mr. Freeman pointed out,
13 the judgement itself or the Court's
14 order doesn't, you know, allege or
15 assert what damages the plaintiff is
16 allowed to recover against Texas
17 Insurance. The judgement entered
18 directly against Texas Insurance. The
19 judgement or the Court's order, itself,
20 does not improperly inflate any damages
21 that Texas Insurance is liable for.

22 It doesn't aggravate the
23 contractual rights against the parties.
24 Those are all issues that have to be
25 dealt with in the collateral case, the



1 -- case pending in federal court.

2 This judgement is just a judgement
3 on its face as entered against an
4 underinsured motorist, Brian McCleod.

5 And beyond that, what exposure and
6 what liability Texas Insurance may or
7 may not be responsible for for any
8 breach of contract or bad faith, those
9 are all issues that have to be, you
10 know, resolved in the subsequent bad
11 faith claim.

12 So, you know, all in all I think
13 that's really the main topics I have.
14 As I said, I'm trying to be just broad
15 and touch on everything.

16 General, you know, under Rule 60
17 there's no grounds for mistake,
18 inadvertent or truthful neglect by
19 Texas Insurance -- they set forth the
20 judgement wouldn't be voidable for lack
21 of service under Rule 5 or 6 and
22 respectfully I just ask the Court to
23 deny Texas Insurance's motion to
24 reconsider.

25 I'm happy to answer any questions



1 if the Court has any. I think that's
2 all I have generally.

3 THE COURT: Thank you. Any reply,
4 Mr. Freeman?

5 MR. FREEMAN: Yeah, just briefly.

6 I think Jared said that -- I think
7 the first thing he said was that he
8 talked about Rule 5 and the listing of
9 papers that are required to be served.

10 And I think that was basically --
11 they're enumerated and I think upon
12 which Mr. Williams relies is the
13 wording unless otherwise ordered by the
14 Court because of numerous defendants or
15 other reasons, all and then enumerated
16 documents 1 through 11 shall be served
17 upon each of the parties record. And I
18 think that's where he wants to stop
19 reading Rule 5.

20 Rule 5 goes on to discuss when no
21 service need be made. And it says, no
22 service need be made on parties in
23 default for failure to appear.

24 And I think that that's where Rule
25 5 says that, okay, these documents



1 don't have to be served and this is a
2 scenario in which they don't have to be
3 served.

4 But if you go on again to read the
5 rest of Rule 5 that says except that
6 pleadings asserting new or additional
7 claims of relief against them shall be
8 served upon them in the manner provided
9 in serving summons in Rule 4 and notice
10 of any trial or hearing on liquidated
11 damages shall also be given to parties
12 in default.

13 So Rule 5 inherently considers
14 protections for parties in default,
15 which again, as we've already discussed
16 and as -- have already been
17 acknowledged, the UIM carrier was not
18 in default.

19 So what it is is you're -- you're
20 you're -- you've put Texas Insurance
21 Company into a third class of
22 litigants.

23 Rule 5 considers two classes.
24 One, parties of record.

25 And then, two parties in default



1 but it provides protections for parties
2 in default as well.

3 And what we're saying here, by
4 virtue of this order is Texas is
5 neither a party of record who's
6 entitled to service of these papers but
7 is also not a party of default who's
8 entitled to pleadings asserting
9 additional damages and notice of trial
10 or hearing on liquidated damages.

11 And we believe that's an
12 inconsistent application of the -- of
13 Rule 5 and an inconsistent application
14 of the rule related to those statutes
15 related to UIM carriers.

16 And that goes to the middle ground
17 argument that I think Jared made,
18 motion -- service of a motion wasn't
19 required when we believe that service
20 of the motion was required, again,
21 because it's an additional claim for
22 relief against the UIM carrier as was
23 the notice of the hearing on damages.

24 Jared mentioned briefly, I think
25 you said he's unaware of any orders



1 entering default against the UIM
2 carrier. There's actually a lot of
3 orders out there where it was sought to
4 hold a UIM in default and as a default
5 has been entered against the carrier
6 itself.

7 I think there are a number of --
8 the last one -- I just read one
9 yesterday from Judge Lee in Columbia
10 where she entered a default against a
11 UIM carrier. So clearly that does
12 happen.

13 I think Jared mentioned an issue
14 of service. Service is only required
15 on the parties of record.

16 Again, I think that I've covered
17 that efficiently about this kind of
18 third class of litigant.

19 He mentioned that the defendant
20 was served with the offer of judgement
21 through his counsel through e-filing.

22 Well, that's fine. But again,
23 there's no evidence that the defendant
24 could have accepted or rejected an
25 offer of judgement for UIM benefits.



1 It's not his insurance coverage. It's
2 not his obligation or duty to pay UIM
3 benefits and the offer of judgement
4 itself was clearly directed to Texas
5 Insurance Company as the UIM carrier
6 but never served on it.

7 So again, we believe that's -- you
8 know, the finding of whether or not it
9 was served on the defendant and whether
10 or not the defendant could actually
11 accept or reject the offer of
12 judgement, you know, at it's base, this
13 goes to an issue of equity.

14 Is it equitable o hold an
15 underinsured motorist carrier to an
16 award of the special damages of
17 interest, interest and costs having
18 never served them with the offer of
19 judgement or the hearing on the
20 damages.

21 You know, we believe that that is
22 not an equitable conclusion, an
23 equitable result for the UIM carrier.

24 He touched briefly again on Rule
25 6, which again, I think it's his



1 position that that is a time rule.

2 Specifically with respect to Rule
3 6, we were addressing Rule 6D, that's
4 the motions -- the time of service for
5 motions and affidavits.

6 And the rule says a written motion
7 other than one which may be heard ex
8 parte and notice of hearing thereof
9 shall be served not later than ten days
10 before the time specified for the
11 hearing. And again, this is mandatory
12 language, shall be served.

13 So I understand that, you know,
14 it's a time rule but it's also stating
15 that must be served and it's stating
16 when, when it has to be served.

17 So I think that Rule 5 and Rule 6
18 have to be read in conjunction with
19 each other.

20 Jared briefly touched on the
21 notice letter. Again, I don't think
22 that we dispute that he claims that the
23 notice was sent.

24 He may be right. Texas may have a
25 mailing issue, you know. I didn't get



1 involved in this case until well after
2 all of these things were sent and
3 received by various people.

4 But, you know, the issue isn't
5 whether or not the letter was sent.
6 You know, I don't have any evidence
7 that the letter wasn't sent.

8 I think the issue is whether or
9 not that letter constituted proper
10 notice under Rule 5 and Rule 6.

11 And I think the last point that
12 Jared raised really is kind of the
13 heart of the issue of why this is so
14 important.

15 So it seems to me that Jared's
16 basically saying, well, we've got to
17 argue to issue of whether or not these
18 damages can be recovered from the UIM
19 carrier in the collateral case in
20 federal court.

21 Now, the award of these damages
22 obviously I have to argue here in this
23 venue and that's why we've got this
24 motion.

25 But the enforcement of whether or



1 not those damages can be paid by the
2 UIM carrier, whether they're proper
3 against the UIM carrier, I guess we're
4 going to have deal with in federal
5 court.

6 Our position for this and for that
7 -- that future hearing, again, is Texas
8 Insurance was never served with the
9 offer of judgement, was never served
10 with notice and the grounds for the
11 motion for damages.

12 Wasn't served -- the motion itself
13 wasn't served with a supporting
14 affidavit, wasn't served with notice of
15 the method of hearing or the location.

16 And as a result, you know, for all
17 the reasons that we've discussed the
18 award against Texas Insurance would be
19 improper.

20 The award -- the -- I don't want
21 to -- I don't want to be disparaging to
22 Mr. Williams but the characterization
23 in the state court proceeding of this
24 as an award of damages against the
25 defendant but trying to enforce it in



1 the collateral venue against a
2 non-defendant I think is kind of
3 playing fast and loose.

4 And, you know, I think -- it's --
5 if it's not equitable here in the state
6 court it's not equitable in federal
7 court.

8 If it's not going to be equitable
9 in federal court it can't be equitable
10 here in state court. Thank you.

11 THE COURT: All right. Thank you,
12 Mr. Freeman. Any reply?

13 MR. WILLIAMS: Just very, very
14 quickly.

15 Going back to Rule 5 and the
16 interpretation of, you know, the
17 language noting service made on parties
18 of record.

19 You know, if you look at the rule
20 itself and the note that you've got to
21 file an amendment kind of goes on with
22 that. It says the amendment in
23 Subsection A makes explicit that all --
24 documents and papers including but not
25 limited to pleadings and amended



1 pleadings, discovery requests and
2 responses, motions and similar papers
3 are to be served on every party of
4 record.

5 I think the language is very
6 clear, if you're not a party of record
7 service is not required under Rule 5.

8 In regard to the issue of an order
9 being entered directly against the UIM
10 carrier, Mr. Freeman has said he has
11 found some -- I'm not aware of any that
12 have been entered against an UIM
13 carrier where an insurer had been filed
14 in the name of the defendant. That's a
15 distinction.

16 So, you know, in this case Mr.
17 McCleod was served. Answer was filed
18 by the liability carrier it named.

19 I've, myself, tried to file for
20 default and be told I can't do it
21 because an answer has been filed in the
22 name of the UIM carrier.

23 So I'm not aware of any situation
24 where there's an answer filed in the
25 name of the defendant and then a court



1 can enter default directly against the
2 UIM carrier.

3 Regardless, I'm not sure if it's
4 all that important whether default was
5 entered against the UIM carrier or not
6 because it doesn't change the fact that
7 they were not a party of record.

8 Mr. Freeman continues to site, you
9 know, a number of documents that were
10 not served on Texas Insurance and he's
11 correct.

12 But what was served was the
13 summons and complaint and it was served
14 multiple times.

15 So if Texas Insurance wanted to
16 get involved in this case, they wanted
17 to receive service of additional
18 documents all they had to do was file
19 notice of appearance and they would
20 have been served with everything that
21 was filed with the Court.

22 They didn't do that. And so I
23 think that the consequences are on
24 Texas Insurance at that point.

25 That's all I have.



1 THE COURT: All right. Thank you,
2 guys. I'm going to take that under
3 advisement. I'll review your written
4 motions and what you've discussed
5 today.

6 What I think I'm going to do is
7 I'll come to a conclusion on a ruling
8 and get the prevailing party to draft a
9 proposed order. I don't think I need
10 to get proposed orders from both of you
11 until I rule on this and I'll do that
12 as promptly as I can.

13 All right. Anything further, Mr.
14 Williams?

15 MR. WILLIAMS: No. That's all I
16 have.

17 THE COURT: Anything further, Mr.
18 Freeman?

19 MR. FREEMAN: No, sir. Thank you.

20 THE COURT: All right.

21 (Whereupon, the Motion to
22 Reconsider Hearing was
23 concluded at
24 approximately 10:52 a.m.)
25



1 C E R T I F I C A T E

2

3 STATE OF GEORGIA:

4 CHATHAM COUNTY:

5

6 I, Kyle J. Saniga, Court Reporter and
7 Notary Public in and for the above county and
8 state, do hereby certify that the foregoing
9 testimony was taken before me at the time and
10 place herein-before set forth; that the witness
11 was by me first duly sworn to testify to the
12 truth, the whole truth, and nothing but the
13 truth, that thereupon the foregoing testimony
14 was later reduced by computer transcription; and
15 I certify that this is a true and correct
16 transcript of my stenographic notes so taken.

17 I further certify that I am not of
18 counsel to either party, nor interested in the
19 event of this cause.

20

21

Kyle J. Saniga

22

23

Kyle J. Saniga, CCR

24

Notary Public, B-2038

25

Savannah, Georgia



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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT

COUNTY OF HORRY

VIKTAR KLEUCHENIA, *et al*,

Case No.: 2021CP2604596

v.

BRIAN MCLEOD, *et al*,AFFIDAVIT OF SERVICE

DEFENDANT: Brian McLeod

Being duly sworn on my oath, I GINA SHARBOWSKI declare that I am a citizen of the United States, over the age of eighteen, authorized to serve process in this jurisdiction, and not a party to or interested in the proceedings of this action. I received this process on 7-20-21, and that I personally served the following: SUMMONS (JURY TRIAL DEMANDED); COMPLAINT (JURY TRIAL DEMANDED); in regards to the matter, upon:

BRIAN MCLEOD

as follows:

RESIDENTIAL SERVICE: by serving: DIANE MCLEOD, wife/co-resident, *personally*,
by identifying her and handing her the papers

Sex: F Age: 40-*50's Race: W/Auburn-red hair/5'3"-5'5"/140-150lbs

at:

Complete Address of ServiceDay, Date, Time of service

RESIDENTIAL Address:

7327 Hillsboro CourtWed. **JUL 21 2021** @ 3:05pmCanton, Michigan 48187

WAYNE County, Michigan

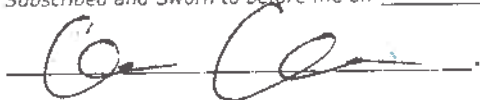
I declare under the penalties of perjury that the information contained in this Affidavit of Service is true and correct.



Gina Sharbowski
Process Server

1221 Bowers Street, #103
Birmingham, MI 48012

Subscribed and Sworn to before me on **JUL 22 2021**



CHRISTOPHER C CHALANDA
NOTARY PUBLIC - STATE OF MICHIGAN
My Commission Expires October 07, 2026
Acting in the County of ORANGE



South Carolina Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

HENRY McMASTER
Governor

RAYMOND G. FARMER
Director

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105

August 17, 2021

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
ONYX INSURANCE COMPANY, INC., A RISK RETENTION GROUP
575 S. Saliman Road
Carson City, NV 89701-0000

Dear Sir:

On August 17, 2021, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-87-80(C). By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 38-77-160. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to sdubois@doi.sc.gov. When replying, please refer to File Number 185194, Viktar Kleuchenia v. Brian McCleod, 2021-CP-26-04596.

By:

Gwendolyn L. Fuller
General Counsel
(803)737-6732

Sincerely Yours,

Raymond G. Farmer
Director
State of South Carolina
Department of Insurance

Attachment

CC: Jared C. Williams
Post Office Box 403
Mount Pleasant, SC 29465

ELECTRONICALLY FILED - 2021 Aug 19 8:40 AM - Horry - COMMON PLEAS - CASE#2021CP2604596

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SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
■ Complete items 1, 2, and 3. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature X <i>Chris Sheets</i> ☐ Agent ☐ Addressee	
1. Article Addressed to: <i>Texas Insurance Company</i> <i>10805 Old Mill Road</i> <i>Omaha, NE 68154</i>		B. Received by (Printed Name) <i>Chris Sheets</i>	C. Date of Delivery <i>9-27</i>
2. Article Number (Transfer from service label) 7022 2410 0001 4795 0310		D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No	
3. Service Type ☐ Adult Signature ☐ Adult Signature Restricted Delivery ☒ Certified Mail® ☐ Certified Mail Restricted Delivery ☐ Collect on Delivery ☐ Collect on Delivery Restricted Delivery ☐ Insured Mail ☐ Insured Mail Restricted Delivery (over \$500)		☐ Priority Mail Express® ☐ Registered Mail™ ☐ Registered Mail Restricted Delivery ☐ Signature Confirmation™ ☐ Signature Confirmation Restricted Delivery	
PS Form 3811, July 2020 PSN 7530-02-000-9053		Domestic Return Receipt	

USPS TRACKING#



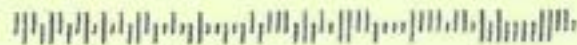
First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

9590 9402 7796 2152 3342 83

United States
Postal Service

* Sender: Please print your name, address, and ZIP+4® in this box*

Jared Williams
P.O. Box 403
Mt. Pleasant, SC 29465





South Carolina Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

HENRY McMASTER
Governor

MICHAEL WISE
Acting Director

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105

September 27, 2022

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Texas Insurance Company
700 North Pearl, 25th Floor
25th Floor
Dallas, TX 75201

Dear Sir:

On September 27, 2022, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-45-170. By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 38-77-160. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. The claimant, within this service letter, provided the following additional information regarding this first party claim: POLICY/CLAIM NUMBER OIC-SC-0001119-02. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to spurvis@doi.sc.gov. When replying, please refer to File Number 190666, Viktar Kleuchenia v. Brian Mcleod, 2021-CP-26-04596.

By:

Gwendolyn McGriff
General Counsel
(803)737-6732

Sincerely Yours,

Michael Wise
Acting Director
State of South Carolina
Department of Insurance

Attachment

CC: Jared C. Williams
Post Office Box 403
Mount Pleasant, SC 29465

ELECTRONICALLY FILED - 2022 Oct 04 2:36 PM - Horry - COMMON PLEAS - CASE#2021CP2604596

STATE OF SOUTH CAROLINA

COVENANT NOT TO EXECUTE

COUNTY OF HORRY

This COVENANT made this 23 day of february, 2023, by and between **VIKTAR KLEUCHENIA**, (hereinafter referred to as "Covenantor") and **GEICO INDEMNITY COMPANY** (hereinafter referred to as "Covenantee".)

WHEREAS, on **JULY 17, 2018**, in **HORRY** County, South Carolina, the Covenantor, **VIKTAR KLEUCHENIA**, was allegedly injured in a motor vehicle accident with **BRIAN MCLEOD**; and

WHEREAS, the automobile being driven by **BRIAN MCLEOD** was owned by **BRIAN MCLEOD** and insured by **GEICO INDEMNITY COMPANY**; and

WHEREAS, the automobile being driven by **BRIAN MCLEOD** had only \$1,000,000.00 per person and \$1,000,000.00 per accident bodily injury liability coverage with the Covenantee, **GEICO INDEMNITY COMPANY**, under policy number 4349-56-64-57; and

WHEREAS, there may be additional insurance coverage that applies hereto; and

WHEREAS, any execution of any additional judgment received as a result of the injuries claimed herein, will be satisfied from any additional or excess liability coverage or underinsured motorist coverage and not from the personal assets of **BRIAN MCLEOD**; and

WHEREAS, Covenantor agrees that his sole recovery additional hereto is limited to recovery under any liability or underinsured motorist policy and not from execution, except to the extent of any applicable liability and/or underinsured motorist coverage, against the personal assets of **BRIAN MCLEOD**; and

WHEREAS, this Covenant does not prohibit Covenantor from pursuing and collecting other liability coverage, whether denominated as excess or primary, or other underinsured motorist coverage; and

WHEREAS, pursuit of other liability coverage or underinsured motorist coverage will not affect the personal or individual exposure of **BRIAN MCLEOD**, except to the extent of any applicable liability or underinsured motorist coverage; and

WHEREAS, the damages sustained by the Covenantor, in the automobile accident of **JULY 17, 2018** may exceed the liability

limits of the insurance policy of Covenantee **GEICO INDEMNITY COMPANY**, and the Covenanter is desirous of protecting his right to continue his suit against **BRIAN MCLEOD** for purposes of collecting additional liability coverage and/or underinsured benefits; and

NOW, FOR AND IN CONSIDERATION OF the payment to the Covenanter of the sum of **EIGHT HUNDRED THOUSAND AND NO/100S (\$800,000.00) DOLLARS** by the Covenantee, the sufficiency and receipt of which is hereby acknowledged, Covenanter and Covenantee agree as follows:

1. That in the event Covenanter is unable to resolve by agreement and settlement his claim with any additional liability insurance carrier or underinsured carrier, Covenanter shall have the right to continue the suit against **BRIAN MCLEOD** and prosecute same to final judgment.

2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that **BRIAN MCLEOD**, his respective spouse, heirs and assigns, shall never at any time, be personally liable to Covenanter, his subrogees, heirs, or assigns, beyond the consideration expressed herein, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to the Covenanter of the sum of **EIGHT HUNDRED THOUSAND AND NO/100S (\$800,000.00) DOLLARS**, Covenanter, his subrogees, heirs, or assigns, shall not at any time, enforce against **BRIAN MCLEOD**, by execution or otherwise, any judgment that may be rendered in the above-mentioned lawsuit except as herein stated. Upon satisfaction of judgment of the aforementioned lawsuit, Covenanter, his subrogees, heirs, or assigns will immediately provide **BRIAN MCLEOD** with an executed Satisfaction of Judgment in any case presented by Covenanter against Covenantee or for the accident dated **JULY 17, 2018**, unless such Satisfaction of Judgment will impede collection or pursuit of additional liability coverage or underinsured motorist coverage. If a Satisfaction of Judgment will impede collection or pursuit of additional liability coverage or underinsured motorist coverage, Covenanter will provide **BRIAN MCLEOD** a Satisfaction of Judgment upon the earlier of the following events: (a) payment of said judgment by any other liability insurance carrier and/or underinsured motorist carrier or (b) final resolution of any additional liability coverage and/or underinsured motorist coverage claim, which may include a third-party lawsuit for recovery of judgment or benefits. If immediate satisfaction of the judgment is not filed after either payment of the judgment or final resolution of any other liability or underinsured motorist claim, including a potential third-party lawsuit, this Covenant may be recorded as a Satisfaction of Judgment.

3. Covenantor, Covenantee and **BRIAN MCLEOD** expressly reserve all rights of action, claims, demands or other legal remedies against all firms and persons except as modified by the terms of this Covenant. This Covenant is not a release, nor shall it be construed as a release of any party, person, firm, or corporation.

4. Covenantor expressly represents that he is represented by counsel, has been fully advised of all facets of potential lawsuit, and all claims arising out of or in relation thereto, and is aware and fully advised that the execution of this instrument will fully and forever prevent and bar the collection of any additional payments of any kind, nature or, description against **BRIAN MCLEOD** personally, his personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys, except as herein stated to include pursuit of additional coverage.

5. In executing this agreement, Covenantor represents and warrants that he has relied on his investigation and on the investigation and advice of his attorney and has not relied on any statement, representation, or commitment of any kind made by Covenantee, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

6. All provisions and recitals in this Covenant are intended to be and are Covenants of the parties and are a material part of this agreement and binding on the parties hereto, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

7. The Covenantor agrees that if there exists any subrogation, assignment, lien, or interest, whether created by contract, statute or otherwise, that he will obtain a release from the person or entity holding such interest and that the Covenantor will protect, save, defend and hold harmless the Covenantee and **BRIAN MCLEOD** from any such subrogation, assignment, claims, or interests.

8. The Covenantor and the Covenantor's attorney expressly agree to keep Covenantee and **BRIAN MCLEOD** abreast of developments in their attempts to collect additional liability coverage and/or underinsured motorist benefits, including specific notice as to the date of trial, the amount of verdict, status of and whether a settlement has been obtained.

9. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a doubtful and disputed claim, that the Covenantee and **BRIAN MCLEOD** and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability.

10. All parties agree that this Covenant is a product of negotiation and agreement among the parties.

11. The provisions and stipulations hereof shall inure to the benefit of, and shall be binding upon, the heirs, executors, administrators, assigns and successors in interest of the parties hereto.

12. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina law.

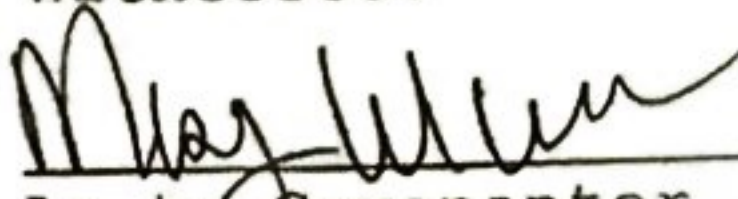
13. Covenantor acknowledges that he has been advised by an attorney for advice and counsel on the consequences of executing this Covenant Not to Execute. Further, Covenantor acknowledges that neither Covenantee nor **BRIAN MCLEOD** have made any representations on the availability of excess liability coverage and/or underinsured motorist coverage should this Covenant be executed.

14. Should any damages be incurred by **BRIAN MCLEOD** due to the failure to immediately satisfy any judgment hereafter rendered, Covenantor agrees to save, defend, hold harmless and indemnify Covenantee and **BRIAN MCLEOD** from any and all liability therefor.

CLAIM NUMBER: 0381848190101049

IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.

Witnesses:


As to Covenantor


As to Covenantor


VIKTAR KLEUCHENIA



Jared C. Williams, Esq.
Licensed in SC
jared@williamslawsc.com

August 20, 2024

Via Certified Mail- RRR

Texas Insurance Company
10805 Old Mill Road
Omaha, NE 68154

**RE: Viktor Kleuchenia v. Brian McLeod
Civil Action No.: 2022-CP-26-04596**

To Whom it May Concern:

The above-referenced case was tried before a special referee on April 9, 2024, in which Texas Insurance Company was previously served as the underinsured motorist (UIM) carrier. Enclosed is a copy of the *Order on Plaintiff's Motion for Costs and Interest* which has been entered in the Court of Common Pleas for Horry County, South Carolina. Please issue payment of the entered judgment within twenty (20) days of the date of this correspondence made payable to "Viktar Kleuchenia and Law Office of Jared C. Williams, LLC" addressed to P.O. Box 403, Mount Pleasant, SC 29465, accompanied with a full release.

Should you have any questions or concerns, please feel free to contact me at (843) 991-6528, or by e-mail at jared@williamslawsc.com.

Sincerely,

Law Office of Jared C. Williams, LLC

A handwritten signature in black ink, appearing to be 'JC Williams', written over a horizontal line.

Jared C. Williams

cc: Viktor Kleuchenia (via e-mail)

Law Office of Jared C. Williams, LLC
P.O. Box 403, Mount Pleasant, South Carolina 29465
Office: (843) 991-6528 | Direct: (803) 429-3393
www.williamslawsc.com

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

VIKTAR KLEUCHENIA,

Plaintiff,

v.

BRIAN MCLEOD,

Defendant.IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2021-CP- 26-04596

**ORDER ON PLAINTIFF'S MOTION
FOR COSTS AND INTEREST**

This matter is before the Court on Plaintiff's Motion for Costs and Interest ("Plaintiff's Motion"), which was timely filed on June 5, 2024, following an *Order of Judgment for Damages* entered by the Court on June 4, 2024. Plaintiff's Motion is made pursuant to Rules 54 and 68, *SCRCP*, and S.C. Code § 15-35-400. Plaintiff seeks an order from the Court taxing costs and awarding Plaintiff interest and costs owed as a consequence of failing to accept *Plaintiff's Offer of Judgment* to resolve the above captioned case before trial.

On August 17, 2023, Plaintiff filed an offer of judgment pursuant to Rule 68, *SCRCP*, for \$50,000.00, which was not accepted. A damages trial was held on April 9, 2024. On June 4, 2024, the Court entered its *Order of Judgment for Damages*, returning a judgment in favor of Plaintiff for \$2,250,000.00. As noted, Plaintiff's Motion was timely filed on June 5, 2024.

I. Costs

Rule 54, *SCRCP*, allows for specifically enumerated costs and disbursements to the prevailing party. In addition to the taxable costs permitted under Rule 54, Rule 68(b), *SCRCP*, provides that a Plaintiff may be broadly entitled to "any administrative, filing, or other court costs from the date of the offer until the entry of the judgment." *Id.*; see also *Black v. Roche Biomedical Laboratories*, 315 S.C. 223, 227, 433 S.E.2d 21, 24 (Ct. App. 1993) (The intent of Rule 68 is "to encourage settlement and avoid protracted litigation.").



Accompanied as Exhibit A to Plaintiff's Motion is the Attorney Affidavit of Jared C. Williams, Esq., setting forth the following costs:

Rule 54 Costs

• Fees of the Clerk:	\$180.32
• Fees Incurred in Service of Process:	\$85.00
• Fees for Exemplification and Copies of Papers Necessarily Obtained for Trial:	\$255.99

Rule 68 Costs

• Court Reporter Charges for Trial:	\$1,339.95
• Special Referee Charges:	\$3,420.00

The Court finds the costs set forth under Rule 54 are specifically enumerated in the language of the Rule and appropriate. Moreover, the Court finds the costs set forth under Rule 68 have been incurred after the filing of the offer of judgment and are proper under the Rule. The Court finds the costs in the amount of \$5,281.26, along with the timing the Rule 68 Costs, are supported by the Attorney Affidavit of Jared C. Williams, Esq. The Court declines to award expert witness fees incurred as taxable costs (The Special Referee charges include an additional \$300.00 charge incurred on ruling on this motion).

II. Offer of Judgment Interest

Both Rule 68, *SCRPC*, and S.C. Code § 15-35- 400 specifically state the plaintiff is entitled to eight percent (8%) interest "on the amount of the verdict or award" from the date of the offer to the entry of judgment whenever the defendant does not accept the offer of judgment and the verdict is more favorable to the plaintiff than the offer made. Moreover, the language of Rule 68 and § 15-35- 400 indicate the award of interest pursuant to each authority is not discretionary but, rather, a right as a matter of law. *See id.*; *see also Garrison v. Target Corp.*, 435 S.C. 566, 586, 869 S.E.2d 797, 808 (2022) ("We find the language of both the rule and the statute clearly and unambiguously provide that [the plaintiff] is entitled to eight percent interest on the entire amount of the verdict.").

RWB
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Plaintiff filed his offer of judgment on August 17, 2023, which was not accepted. The Court entered its *Order of Judgment for Damages* on June 4, 2024, in the amount of \$2,250,000.00, which is greater than the Offer of Judgment amount. The Court finds Plaintiff is entitled to an award of interest on the judgment amount totaling \$143,506.85, which represents eight percent (8%) annual interest over 291 days.¹

CONCLUSION

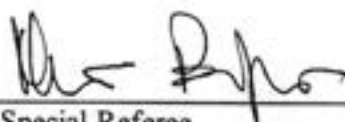
WHEREAS, the Court hereby **GRANTS** Plaintiff's *Motion for Costs and Interest*, and awards costs in the amount of \$5,281.26, pursuant to Rules 54 and 68, *SCRPC*. The Court further awards Plaintiff interest pursuant to S.C. Code § 15-35-400 and Rule 68, *SCRPC*, in the amount of \$143,506.85 as of June 4, 2024.

These amounts shall be added to the award amount set forth in the Court's *Order for Judgment of Damages* filed on June 4, 2024, and the Clerk of Court is instructed to effect entry of final judgment in the amount of **\$2,398,788.11** with interest to begin accruing upon entry.

IT IS SO ORDERED.

July 1, 2024

Myrtle Beach, SC



By: Special Referee

Robert W. Buffington (SC Bar # 7825)

2411 North Oak Street, Suite 305-F

Myrtle Beach, South Carolina 29577

Tel: (843) 443-4019

Email: bobby@bufflawfirm.com



Horry County Fifteenth Judicial Circuit Public Index



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Search view

Viktar Kleuchenia VS Brian McLeod					
Case Number:	2021CP2604596	Court Agency:	Common Pleas	Filed Date:	07/12/2021
Case Type:	Common Pleas	Case Sub Type:	Motor Veh Accid 320	File Type:	Jury
Status:	Judgment	Assigned Judge:	Special Referee G S And C P		
Disposition:	Judgment	Disposition Date:	06/04/2024	Disposition Judge:	Clerk Of Court C P, G S, And Family Court
Original Source Doc:		Original Case #:		Restore Reason:	Reopened Case
Judgment Number:	2021CP2604596	Court Roster:			

Case Parties		Judgments		Tax Map Information		Associated Cases		Actions		Financials	
For:	Kleuchenia, Viktar		Against:	McLeod, Brian		Judg. Amount:	\$800,000.00		Judgment Date:	01/25/2023	
Description:	Judgment/Judgment		Disposition:	Satisfied Or Cancelled		Disp. Date:	03/27/2023		Date Entered/Last Changed	01/25/2023 -- 07/03/2024	
Notes:	None										
Judgment Details											
Claims Code		Detail Desc.				Detail Amount			Detail Date		
JGM		Order for Cost added to the \$2,250,000.00 from 6-4-24 Order				\$2,398,788.11			07/02/2024		

Request for Taxpayer Identification Number and Certification

Give Form to the
requester. Do not
send to the IRS.

Go to www.irs.gov/FormW9 for instructions and the latest information.

1 Name (as shown on your income tax return). Name is required on this line; do not leave this line blank.

Law Office of Jared C. Williams, LLC

2 Business name/disregarded entity name, if different from above

3 Check appropriate box for federal tax classification of the person whose name is entered on line 1. Check only one of the following seven boxes.

☐ Individual/sole proprietor or single-member LLC ☐ C Corporation ☐ S Corporation ☐ Partnership ☐ Trust/estate

☐ Limited liability company. Enter the tax classification (C=C corporation, S=S corporation, P=Partnership) ▶

Note: Check the appropriate box in the line above for the tax classification of the single-member owner. Do not check LLC if the LLC is classified as a single-member LLC that is disregarded from the owner unless the owner of the LLC is another LLC that is not disregarded from the owner for U.S. federal tax purposes. Otherwise, a single-member LLC that is disregarded from the owner should check the appropriate box for the tax classification of its owner.

☐ Other (see instructions) ▶

4 Exemptions (codes apply only to certain entities, not individuals; see instructions on page 3):

Exempt payee code (if any) _____

Exemption from FATCA reporting code (if any) _____

Applies to accounts maintained outside the U.S.

5 Address (number, street, and apt. or suite no.) See instructions.

P.O. Box 403

Requester's name and address (optional)

6 City, state, and ZIP code

Mount Pleasant, SC 29465

7 List account number(s) here (optional)

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on line 1 to avoid backup withholding. For individuals, this is generally your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the instructions for Part I, later. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN*, later.

Note: If the account is in more than one name, see the instructions for line 1. Also see *What Name and Number To Give the Requester* for guidelines on whose number to enter.

Social security number

____ - ____ - ____

or

Employer identification number

8 1 - 4 5 4 3 5 0 2

Part II Certification

Under penalties of perjury, I certify that:

- The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me); and
- I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding; and
- I am a U.S. citizen or other U.S. person (defined below); and
- The FATCA code(s) entered on this form (if any) indicating that I am exempt from FATCA reporting is correct.

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the certification, but you must provide your correct TIN. See the instructions for Part II, later.

Sign
Here

Signature of
U.S. person ▶



Date ▶

1/4/2024

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Future developments. For the latest information about developments related to Form W-9 and its instructions, such as legislation enacted after they were published, go to www.irs.gov/FormW9.

Purpose of Form

An individual or entity (Form W-9 requester) who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) which may be your social security number (SSN), individual taxpayer identification number (ITIN), adoption taxpayer identification number (ATIN), or employer identification number (EIN), to report on an information return the amount paid to you, or other amount reportable on an information return. Examples of information returns include, but are not limited to, the following.

- Form 1099-INT (interest earned or paid)

- Form 1099-DIV (dividends, including those from stocks or mutual funds)
 - Form 1099-MISC (various types of income, prizes, awards, or gross proceeds)
 - Form 1099-B (stock or mutual fund sales and certain other transactions by brokers)
 - Form 1099-S (proceeds from real estate transactions)
 - Form 1099-K (merchant card and third party network transactions)
 - Form 1098 (home mortgage interest), 1098-E (student loan interest), 1098-T (tuition)
 - Form 1099-C (canceled debt)
 - Form 1099-A (acquisition or abandonment of secured property)
- Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN.
- If you do not return Form W-9 to the requester with a TIN, you might be subject to backup withholding. See *What is backup withholding*, later.



Texas Insurance Company
P.O. BOX 3646, OMAHA, NE 68103-0646

Writer's Direct Line 402-342-4900 ext. 4141; Facsimile 402-393-8558

E-Mail: jeffreysilver@silver-law.net

September 4, 2024

Via Electronic Mail and U.S. Mail

Jared C. Williams, Esq.
P.O. Box 403
Mount Pleasant, South Carolina 29465

RE: Viktor Kleuchenia v. Brian McLeod
Civil Action No.: 2022-CP-04596

Dear Mr. Williams:

This will acknowledge receipt of your August 20, 2024 correspondence directed to Texas Insurance Company ("TIC") enclosing a copy of the Order on Plaintiff's Motion for Costs and Interest (the "Motion").

We are perplexed by not only the Motion but the reference in the Motion to an August 17, 2023 Offer of Judgment, a damages trial on April 9, 2024 and a June 4, 2024 Order of Judgment for Damages returning a judgment in favor of Plaintiff for \$2,250,000.

First, TIC has not issued any insurance policy to your client, Viktor Kleuchenia.

Second, TIC has no record of being served any documents including, but not limited to a summons. If you have evidence of TIC being served, please forward it to my attention.

Third, TIC has no record of receiving an Offer of Judgment of \$50,000 on August 17, 2023. If you have evidence that the referenced Offer of Judgment was sent to TIC, please provide it to the undersigned.

Fourth, TIC has no record of receiving notice of any Motion for Summary Judgment on the issue of liability or Notice of the damages trial on April 9, 2024. If you have evidence of notice of either of these proceedings being sent to TIC, please provide that to me.

Onyx Insurance Company's ("Onyx") records reflect Policy, No. OIC-SC-0001119-2 for the period of March 29, 2018 to March 29, 2019 being issued to Viktor Kleuchenia (the

Jared C. Williams, Esq.
September 4, 2024
Page 2

"Policy"), a copy of which is enclosed. The Policy provides \$25,000 in uninsured/underinsured motorist coverage.

As noted above, we have very few details on how this matter got to its current state. In any event, if you are claiming uninsured/underinsured motorist coverage of \$25,000 under the Policy, please provide any and all documents that support that claim including, but not limited to any consents to settlement that were obtained.

Notwithstanding anything in this correspondence to the contrary, both TIC and Onyx reserve all of their rights with respect to this matter and nothing contained herein should be construed as a waiver of any such rights.

In view of the time frame involved, your early attention to this matter is requested since we may need to take further Court action to protect TIC's and Onyx's interests.

Very truly yours,



JEFFREY A. SILVER
Secretary and General Counsel

JAS/ld

CC: File

ONYX INSURANCE COMPANY, INC. A RISK RETENTION GROUP

237 Kearny Street, #143
San Francisco, CA 94108

CONFIRMATION OF COVERAGE COMMERCIAL AUTOMOBILE LIABILITY INSURANCE BINDER

INSURED: **Viktar Kleuchenia (Imperial Cab)**
ADDRESS: **617 36th Ave N, Myrtle Beach, South Carolina, 29577**

DATE: **3/29/2018**

POLICY NUMBER: **OIC-SC-0001119-02**

EFFECTIVE DATE: (12:01 AM Local Time): **03/29/2018**

EXPIRATION DATE (12:01 AM Local Time): **03/29/2019**

COVERAGE:	Commercial Automobile Liability Insurance		
LIMITS OF LIABILITY:	\$25,000.00/\$50,000.00/\$25,000.00		
UNINSURED MOTORISTS:	\$25,000.00/\$50,000.00/\$0.00		
UNDERINSURED MOTORISTS:	\$25,000.00/\$50,000.00/\$0.00		
PERSONAL INJURY PROTECTION:	\$0.00		
DEDUCTIBLE PER INCIDENT:	\$0.00	AGGREGATE DEDUCTIBLE	\$0.00
# OF INSURED UNITS:	2	PREMIUM PER UNIT:	\$1,240.00
TOTAL PREMIUM:	\$2,480.00	MINIMUM EARNED:	25%
TOTAL TAXES:	\$36.01	TOTAL FEES:	\$550.00

As a requirement of coverage under this policy, all covered autos must have a properly installed video camera approved by us and which is turned on and properly functioning, within 10 days of the Effective Date shown above or within 7 days of the receipt of the cameras.

In the event an accident or incident occurs 10 days after the Policy Effective Date or after the 7 day period granted for installing the camera, and the camera is not properly installed, turned on, properly functioning and/or we are not provided with working video which fully depicts the accident in question, then a \$2,500 fee will be assessed.

PREMIUM IS DUE UPON DATE OF BINDING AND HAS TO BE RECEIVED ON OUR OFFICE NO LATER THAN FIVE (5) WORKING DAYS FROM THE EFFECTIVE DATE. FAILURE TO RECEIVE THE PREMIUM WILL RESULT IN IMMEDIATE FLAT CANCELLATION WITH NO COVERAGE BEING IN FORCE.



Jason Sears - Secretary
(Authorized Representative)

For inquiries contact:

Policy Support at transportationpolicysupport@rivpartners.com 415-429-4924



HOW TO REPORT A CLAIM:

All claims should be reported to North American Risk Services (NARS) as soon after the loss as possible while information is fresh. Claims may be reported by any of the following options 24 hours a day, 7 days a week.

Telephone:	(800) 315-6090
Facsimile:	(866) 261-8507
Internet:	http://www.narisk.com/partnerEtools.php
Electronic Mail:	reportclaim@narisk.com
Regular Mail:	North American Risk Services P.O. Box 166002 Altamonte Springs, FL 32716-6002 Attn: New Loss Unit

In order to ensure proper assistance, it is important to include a Loss Accord form or the policy number, name of the insured and as much information about the loss details and involved parties as possible. An adjuster will be assigned to the claim, and after reviewing the information provided will make personal contact. Remember to include contact information such as your name, address, phone numbers and email address.

A claim acknowledgement will be transmitted identifying the claim number and assigned claims adjuster.

Please note: It is our preference that claims of a serious nature are phoned into NARS. This allows us to escalate the loss immediately.

POLICY NUMBER: OIC-SC-0001119-02

BUSINESS AUTO POLICY DECLARATIONS

ONYX INSURANCE COMPANY, INC. A RISK RETENTION GROUP

One Nashville Place
150 Fourth Avenue, North
Suite 1100
Nashville, TN 37219

Mailing Address:
237 Kearny Street, #143
San Francisco, CA 94108
Phone: 917-822-4238

ITEM ONE

NAMED INSURED: Viktor Kleuchenia (Imperial Cab)

MAILING ADDRESS: 617 36th Ave N
#G
Myrtle Beach, SC 29577

Note: The insurance policy is issued by Onyx Insurance Company Inc., a Risk Retention Group. Your Risk Retention Group may not be subject to all of the insurance laws or regulations of your State. State insurance insolvency guaranty funds are not available for your Risk Retention Group. Read your policy and its coverage conditions thoroughly.

POLICY PERIOD:

FROM: 03/29/2018 TO: 03/29/2019
(AT 12:01 STANDARD TIME AT YOUR MAILING ADDRESS)

BUSINESS DESCRIPTION: Taxi Service

IN RETURN FOR THE PAYMENT OF PREMIUM, AND SUBJECT TO ALL TERMS OF THIS POLICY AND THE INFORMATION PROVIDED ON THE SIGNED APPLICATION, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

SCHEDULE OF COVERAGES AND COVERED AUTOS

This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "Autos" shown as covered autos, which must be reported to the Company prior to effecting coverage.

COVERAGES	COVERED AUTOS	LIMIT	PREMIUM
BODILY INJURY AND PROPERTY DAMAGE LIABILITY	7	\$25,000.00 Per Person / \$50,000.00 Per Accident / \$25,000.00 Property Damage	<u>\$2,480.00</u>
PERSONAL INJURY PROTECTION (OR EQUIVALENT NO FAULT COVERED)	<u>EXCLUDED</u>	<u>N/A</u>	<u>N/A</u>
UNINSURED MOTORIST	7	\$25,000.00 Per Person / \$50,000.00 Per Accident / \$0.00 Property Damage	<u>INCLUDED</u>
UNDERINSURED MOTORIST	7	\$25,000.00 Per Person / \$50,000.00 Per Accident / \$0.00 Property Damage	<u>INCLUDED</u>
DEDUCTIBLE	7	<u>N/A</u>	<u>N/A</u>

PREMIUM

Commercial Automobile Bodily Injury & Property Damage Liability	<u>\$2,480.00</u>
Uninsured Motorist Coverage	<u>INCLUDED</u>
Total	<u>\$2,480.00</u>

PREMIUM SHOWN IS PAYABLE(minimum 25% of premium is earned at inception):

\$496.00 at inception and 10 installments of \$198.40 each. Installments are due thirty (30) days thereafter prior to the due date.

ITEM TWO: SCHEDULE COVERED AUTOS

DESCRIPTION (LIST ADDITIONAL VEHICLES ON SEPARATE SCHEDULE)					
MAKE	YEAR	MODEL	BODY TYPE	SERIAL NUMBER	VIN
See Schedule On File With the Carrier					

ITEM THREE: LIABILITY DEDUCTIBLE

The Liability Coverage is changed as follows:

The damages including loss adjustment expense caused in any one "accident" that would otherwise be payable under the Liability Coverage will be reduced by the Liability Deductible as shown in the Coverage Schedule on page two above prior to the application of the Limit of Insurance provision. Such Deductible upon invoicing will be paid immediately to the Carrier, and failure to pay will be subject to policy cancellation.

ITEM FOUR: COVERED AUTOS

The Coverage afforded hereunder only covers such automobiles as scheduled with the Carrier.

ITEM FIVE: COVERED DRIVERS

The coverage afforded hereunder is limited to those named drivers as scheduled with the Carrier.

Endorsements Attached to this Policy:

Countersigned:

Date:



Jason Sears - Secretary
(Authorized Representative)

Date: 03/29/2018

ONYX BUSINESS AUTO POLICY COVERAGE

Named Insured: Viktor Kleuchenia (Imperial Cab)

Policy Number: OIC-SC-0001119-02

Inception Date: 03/29/2018

Expiration Date: 03/29/2019

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section VI – Definitions.

NOTE:

The insurance policy is issued by Onyx Insurance Company Inc., A Risk Retention Group. Your Risk Retention Group may not be subject to all of the insurance laws or regulations of your State. State insurance insolvency guaranty funds are not available for your Risk Retention Group. Read your policy and its coverage conditions thoroughly.

SECTION I - COVERED AUTOS

Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a Coverage on the Declarations designate the only "autos" that are covered "autos". It is further agreed and understood that **You** have to advise the Company and receive written confirmation prior to effecting coverage for any covered automobiles to be scheduled as a covered automobile.

A. Description of Covered Auto Designation Symbols:

Symbol		Description of Covered Autos Designation Symbols
1	Any "Autos"	You must notify prior to and receive written confirmation from the Company for coverage to be effected.
2	Owned "Autos" Only	Only those "autos" you own and any "trailers" you don't own while attached to power units you own. This includes those "autos" you acquire ownership of after the policy begins.
3	Owned Private Passenger "Autos" Only	Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins.
4	Owned "Autos" Other Than Private Passenger "Autos" Only	Only those "autos" you own that are not of the private passenger type (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins.
5	Owned "Autos" Subject To No-Fault	Only those "autos" you own that are required to have No-Fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have No-Fault benefits in the state where they are licensed or principally garaged.
6	Owned "Autos" Subject To A Compulsory Uninsured Motorists Law	Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement.
7	"Autos" Specified On Schedule	Only those "autos" described on the schedule and any "trailers" you don't own while attached to power units you own. You must notify prior to and receive written confirmation from the Company for coverage to be effected.

8	Hired "Autos" Only	Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent, or borrow from any of your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households.
9	Non-owned "Autos" Only	Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees", partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business.

B. Owned Autos You Acquire After the Policy Begins

If Symbols 1, 2, 3, 4, 5, or 6 are entered next to a coverage in Item Two of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.

C. Temporary Substitute Autos

If Liability Coverage is provided by this Coverage Form, the following types of vehicles are also covered "autos" for Liability Coverage:

Any "auto" you own while used as a temporary substitute for a covered "auto" you own that is out of service because of its: Breakdown, Repair, Servicing or "Loss" or Destruction.

SECTION II - LIABILITY COVERAGE

A. Coverage

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

We will also pay all sums an "insured" legally must pay as a "covered pollution cost or expense" to which this insurance applies caused by an "accident" and resulting from the ownership, maintenance or use of covered "autos". However we will only pay for the "covered pollution cost or expense" if there is either "bodily injury" or "property damage" to which this insurance applies that is caused by the same "accident."

We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of insurance has been exhausted by payment of judgments or settlements.

1) Who Is An Insured

The following are "insureds":

- a. You for any covered "auto";
- b. Anyone else whom you have advised the Company and received formal approval in writing from the Company while using with your permission a covered "auto" you own, hire, or borrow **EXCEPT**
 - i. The owner or anyone else from whom you hire or borrow a covered "auto" unless you have advised the Company in writing prior to effecting coverage and received written confirmation from the Company of the acceptance of coverage.
 - ii. Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.
 - iii. Someone using a covered "auto" while he or she is working in a business of servicing, repairing, "autos" unless that is part of your business is yours.
 - iv. Anyone other than your "employees", partners (if you are a partnership), members (if you are a limited liability company) or a lessee or borrower or any of their "employees", while moving property to or from a covered "auto".
 - v. A partner (if you are a partnership) or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.
 - vi. Anyone liable for the conduct of an "insured" described above.
 - vii. "Permissive users" who are users of a covered auto, other than "insureds", who are not approved in writing by the Company. Coverage for permissive users is subject to reduction to statutory minimums (see NOTICE OF REDUCTION IN COVERAGE on Page 4).

2) Coverage Extensions

a. Supplementary Payments

We will pay for the "insured" at the Company's option:

- i. All costs taxed against the "insured" in any "suit" against the "insured" we defend.
- ii. All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" against the "insured" we defend but our duty to pay interest ends we have paid or offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

These payments will not reduce the Limit of Insurance.

b. Out of State Coverage Extensions

While a covered "auto" is away from the state where it is licensed we will:

- i. Increase the Limit of Insurance for Liability Coverage to meet the limits specified by a compulsory or financial responsibility law of the jurisdiction where the covered "auto" is being used. This extension does not apply to the limit or limits specified by any law governing motor carriers of passengers or property.
- ii. Provide the minimum amounts and types of other coverages, such as no-fault required of out of state vehicles by the jurisdiction where the covered "auto" is being used.

We will not pay anyone more than once for the same elements of loss because of these extensions.

B. Exclusions

This insurance does not apply to any of the following:

1) Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured".

2) Contractual

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

- a. Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement and such contract has been provided to the Company and You have received formal approval by the Company.

3) Workers Compensation

Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers compensation, disability benefits or unemployment compensation law or any similar law.

4) Employee Indemnification and Employer's Liability

"Bodily injury" to:

- i. An "employee" of the "insured" arising out of and in the course of:
 - a. Employment by the "insured", or
 - b. Performing the duties related to the conduct of the "insured's" business; or
- ii. The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph a. above

This exclusion applies:

- a. Whether the "insured" may be liable as an employer or in any other capacity, and
- b. To any obligation to share damages with or repay someone else who must pay damages of the injury.

5) Fellow Employee

"Bodily injury" to any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business.

6) Care, Custody or Control

"Property damage" to or "covered pollution cost or " involving property owned or transported by the "insured" or in the "insured's" care, custody or control.

7) Handling of Property

"Bodily injury" or "property damage" resulting from the handling of property:

- i. Before it is moved from the place where it is accepted by the "insured" for movement into or onto the "covered auto"; or
- ii. After it is move from the "covered auto: to the place where it is finally delivered by the "insured".

8) Movement of Property by Mechanical Device

"Bodily injury" or "property damage" resulting from the movement of property by a mechanical device.

9) Operations

"Bodily injury" or "property damage" arising out of the operations of:

- i. Any equipment listed in Paragraphs 7.a and 7.b
- ii. Machinery or equipment that is on or attached to or part of the "covered auto".

10) Completed Operations

"Bodily injury" or "property damage" arising out of your work after that work has been completed or abandoned.

In this exclusion your work means:

- i. Work or operations performed by you or your behalf, and
- ii. Materials, parts or equipment furnished in connection with such work or operations.

Your work includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in Paragraph a. or b. above.

Your work will be deemed completed when all of the work called for in your contract has been completed.

Work may need service, maintenance or correction, repair or replacement but which is otherwise complete, will be treated as completed.

11) Pollution

"Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.

12) War

"Bodily injury" or "property damage" arising directly or indirectly out of

- i. War, including undeclared or civil war
- ii. Warlike action by a military force
- iii. Insurrection, rebellion, revolution, usurped power or action taken by governmental authorities in hindering or defending against any of these.

13) Unknown Motor Vehicle

To the extent that this policy includes uninsured and/or underinsured motorists coverage as elected by the insured or required by law, if the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by the unknown person and the person or property of the insured.

C. Limit of Insurance

Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for the total of all damages and "covered pollution cost or expense" combined, resulting from any one "accident" is the Limit of Insurance for Liability Coverage shown in the Declarations

All "bodily injury" and "property damage" and "covered pollution cost or expense" resulting from continuous or repeated exposure to substantially the same condition will be considered as resulting from one "accident".

No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Medical Payments Coverage, Uninsured Motorists Coverage Endorsement attached to this Coverage Part.

NOTICE OF REDUCTION IN COVERAGE

To the extent permitted under applicable state law, the limits shown on the Declarations page are subject to reduction to the state mandatory minimums for bodily injury or death and property damage, when there is a permissive user of the covered auto.

SECTION III - PHYSICAL DAMAGE COVERAGE

This Policy does not provide coverage for Physical Damage Coverage for Comprehensive and/or Collision including any extensions of coverage thereof.

SECTION IV – BUSINESS AUTO CONDITIONS

The following conditions apply in addition to the Common Policy Conditions:

A. Loss Conditions

1) Duties In The Event Of Accident, Claim, Suit Or Loss

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- i. In the event of "accident", "claim", "suit" or "loss" you must give us or our authorized representative prompt **written** notice of the accident or loss to include:
 - a. How, when to include time and where the "accident" or "loss" occurred;
 - b. The "insured's" name and address; and
 - c. To the extent possible the names and addresses of any injured persons and witnesses.
- ii. Additionally you and other involved "insured" must:
 - a. Assume no obligation, make no payment or incur no expense without our consent, except at the "insured's" own cost.
 - b. Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit".
 - c. Cooperate with us in the investigation or settlement of the claim or defense against the "suit".
 - d. Authorize us to obtain medical records or other pertinent information.
 - e. Submit to examination at our expense, by physicians of our choice, as often as we reasonably require.
- iii. If there is "loss" to a covered "auto" or its equipment you must also do the following:
 - a. Promptly notify the police if the covered "auto" or any of its equipment is stolen.
 - b. Take all reasonable steps to protect the covered "auto" from further damage. Also keep a record of your expenses for consideration in the settlement of the claim.
 - c. Permit us to inspect the covered "auto" and records proving the "loss" before its repair or disposition.
 - d. Agree to examinations under oath at our request and give us a signed statement of your answers.

It is further agreed that upon an accident or loss, that if possible you will provide telephonic notice and such contact information has been provided to you. Promptly following this you will advise us in writing and request formal acknowledgement of receipt of such notice

SECTION V - COMMON POLICY CONDITIONS

A. Cancellation

The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.

We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:

- 1) 10 days before the effective date of cancellation if we cancel for nonpayment of any premium due; or
- 2) 30 days before the effective date of cancellation if we cancel for any other reason including but not limited to failure to meet any requirements arising out of an inspection, audit or a material change in exposure.

We will mail or deliver our notice to the first Named Insured's last mailing address known to us.

Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.

If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.

If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. Examination of Your Books And Records

We may examine and audit your books and records as they related to this policy at any time during the policy period and up to three years thereafter.

D. Inspections and Surveys

We have the right to:

- 1) Make inspections and surveys at any time;
- 2) Give you reports on the conditions we find; and
- 3) Recommend and require changes, and failure to make those changes gives us the right to cancel such insurance

We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

- 1) Are safe or healthful; or
- 2) Comply with laws, regulations, codes or standards.

Paragraph 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

E. Premiums

The first Named Insured shown in the Declarations:

- 1) Is responsible for the payment of all premiums; and
- 2) Will be the payee for any return premiums we pay.

F. Transfer of Your Rights and Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

G. Legal Action Against Us

No one may bring a legal action against us under this Coverage Form until:

- 1) There has been full compliance with all of the terms of this Coverage Form; and
- 2) Under Liability Coverage we agree in writing that the "insured" has an obligation to pay or until the amount of that obligation has finally been determined by judgment after trial. No one has the right under this policy to bring us into an action to determine the "insured's" liability.

H. Transfer of Rights of Recovery Against Others to Us

If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after the "accident" or "loss" to impair them.

I. Bankruptcy

Bankruptcy or insolvency of the "insured" or the "insured's" estate will not relieve us of any obligations under this Coverage Form.

J. Concealment, Misrepresentation Or Fraud

This Coverage Form is void in any case of fraud by you at any time as it relates to this Coverage Form. It is also void if you or any other "insured", at any time intentionally conceal or misrepresent a material fact concerning:

- 1) This Coverage Form
- 2) The covered "auto"
- 3) The drivers using any covered "auto"
- 4) Your interest in the covered "auto" or
- 5) A claim under this Coverage Form.

K. Liberalization

If we revise this Coverage Form to provide more coverage without additional premium charge, your policy will automatically provide the additional coverage as of the day the revision is effective in your state.

L. Other Insurance

- 1) For any covered "auto" you own and have advised the Company and received written confirmation of coverage in effect, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance is excess over any other collectible insurance.

- 2) Regardless of the provisions of Paragraph 1) above, this Coverage Form's Liability Coverage is primary for any liability assumed under an "insured contract" as defined in this policy.
- 3) When this Coverage Form and any other Coverage Form or policy covers on the same basis either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

M. Premium Audit

The estimated premium for this Coverage Form is based upon the exposures you advised us in writing you have when the policy began. We will compute the final premium due when we determine your actual exposures. The estimated total premium will be credited against the final premium due and the first Named Insured will be billed for the balance, if any. The due date for the final premium or retrospectively premium is the date shown as the due date on the bill. If the estimated total premium exceeds the final premium due, the first Named Insured will get a refund. If this policy is issued for more than one year, the premium for this Coverage Form will be computed annually based on our rates or premiums in effect at the beginning of each year of the policy.

N. Policy Period, Coverage Territory

Under this Coverage Form, we cover "accidents" and "losses" occurring:

- 1) During the policy period shown in the Declarations, and
- 2) Within the coverage territory.

The coverage territory is the United States of America

O. Two or More Coverage Forms or Policies Issued by Us

If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same "accident" the aggregate maximum Limit of Insurance under all Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy. This condition does not apply to any Coverage Form or policy issued by us or an affiliated company specifically to apply as excess insurance over this Coverage Form.

SECTION VI - DEFINITIONS

- A. "Accident" includes continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage".
- B. "Auto" means:
 - 1) A land motor vehicle, designed for travel on public roads; or
 - 2) Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".
- C. "Bodily injury" means bodily injury, sickness or disease sustained by a person including death resulting from any of these
- D. "Covered pollution cost or expense" means any cost or expense arising out of:
 - 1) Any request, demand, order or statutory or regulatory requirement that any "insured" or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; and such "Covered pollution cost or expense" arising out of an "accident" or "loss" causing "bodily injury" and/or "property damage".
 - 2) Covered pollution cost or expense" does not include any cost or expense arising out of the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants".
 - 3) That are, or that are contained in any property that is:
 - i. Being transported or towed by, handled, or handled for movement into, onto or from the covered "auto";
 - ii. Otherwise in the course of transit by or on behalf of the "insured";
 - iii. Being stored, disposed of, treated or processed in or upon the covered "auto".
- E. "Diminution in value" means the actual or perceived loss in market value or resale value which results from a direct and accidental "loss".
- F. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

- G. "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.
- H. "Insured contract" means:
- 1) A lease of vehicles which has been advised to the Company; and
 - 2) The Company has confirmed in writing that such contract is covered by the insurance afforded by this policy.
- I. Unless otherwise defined in a state-specific supplement and/or selection and /or rejection form accompanying this policy, "Uninsured Motorist(s)" coverage means insurance protection to an insured for compensatory damages which the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury or property damage caused by an automobile accident. Also included are damages due to bodily injury that result from an automobile accident with a hit-and-run vehicle whose owner or operator cannot be identified.
- J. Unless otherwise defined in a state-specific supplement and/or selection and/or rejection form accompanying this policy, "Underinsured Motorists(s)" coverage means insurance protection to an insured for compensatory damages which the insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury caused by an automobile accident.



Jason Sears - Secretary
(Authorized Representative)

POLICY NUMBER: OIC-SC-0001119-02
POLICY PERIOD: 03/29/2018 - 03/29/2019
NAME INSURED: Viktar Kleuchenia (Imperial Cab)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

CAMERA REQUIREMENT

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM

With respect to coverage provided by this endorsement the provisions of the Coverage Form apply unless modified by the endorsement.

As a requirement of coverage under this policy, all covered autos must have a properly installed video camera approved by us and which is turned on and properly functioning, within the time period indicated on the **Commercial Automobile Liability Insurance Binder** issued to the insured.

In the event an accident occurs after this period, involving an insured vehicle, and the camera is not properly installed with functioning video, then a \$2,500 penalty will be assessed.



Jason Sears - Secretary
(Authorized Representative)

Date: 03/29/2018

POLICY NUMBER: OIC-SC-0001119-02
POLICY PERIOD: 03/29/2018 - 03/29/2019
NAME INSURED: Viktor Kleuchenia (Imperial Cab)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

**OPERATING UNDER THE INFLUENCE OF DRUGS OR ALCOHOL OR
OTHER INTOXICANTS/MIND-ALTERING SUBSTANCES**

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM

With respect to coverage provided by this endorsement the provisions of the Coverage Form apply unless modified by this endorsement.

In the event an accident or incident occurs, for which this policy provides coverage, with the driver of the vehicle insured under this policy is found to be operating the vehicle while under the influence of drugs or alcohol or any other intoxicants or mind-altering substances, then Onyx Insurance Company has the sole option to cancel this policy with 20 days' notice OR may elect to impose a minimum deductible of \$3,000 or three times the deductible shown on the **Business Auto Policy Declarations page**, whichever the greater.

It is further agreed, effective immediately at the date of accident or incident, no further coverage under this policy will be provided for the subject accident/incident driver.



Jason Sears - Secretary
(Authorized Representative)
Date: 03/29/2018

ONYX INSURANCE COMPANY, INC., A RISK RETENTION GROUP

SUBSCRIPTION AND SHAREHOLDERS AGREEMENT

INSURED: Viktor Kleuchenia (Imperial Cab)

POLICY #: OIC-SC-0001119-02

THIS SUBSCRIPTION AND SHAREHOLDERS AGREEMENT ("Agreement") is made and entered into the effective date of the Policy identified above by and between ONYX INSURANCE COMPANY, INC., A RISK RETENTION GROUP, a Tennessee corporation (the "Company"), and the Shareholder shown on the signature page of this Agreement (the "Shareholder").

BACKGROUND

A. The Company is a stock corporation and was formed in 2013 as a risk retention group under the federal Liability Risk Retention Act of 1986, as amended, and the laws of the State of Tennessee pertaining to captive insurance companies for the purpose of providing liability insurance to the shareholders and affiliated public livery businesses thereof. The Company is regulated by the Tennessee Department of Commerce and Insurance (the "Department").

B. The Shareholder is a public livery provider or related entity that, as of the effective date of this Agreement, meets the eligibility requirements to be a shareholder of the Company.

C. In order to be an insured of the Company, the Shareholder is required to purchase common stock of the Company, par value Two Dollars (\$2.00), in such quantity and for such price as are set forth below. The total price being paid by the Shareholder to purchase common stock in the Company shall be called the "Capital Contribution."

D. This Agreement is required to be signed by each of the shareholders of the Company.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the sufficiency of which are hereby acknowledged, the Company and the Shareholder hereby agree as follows:

1. Eligibility. The Company has established eligibility requirements that each person or entity insured by the Company is required to meet in order to become a shareholder, which shall include without limitation that each shareholder shall at all times be an insured of the Company, and the Company retains the exclusive right to modify such requirements as it deems appropriate. The Shareholder and the Company agree and acknowledge that they have reviewed the eligibility requirements applicable on the effective date of this Agreement, and that the Shareholder meets such requirements.

2. Shares and Capital Contribution. The Capital Contribution and amount of shares are taken from and calculated on the initial insurance premium. The formula used by the Company to determine the total amount of shares issued is as follows: initial premium amount x .06 ÷ 2. The Capital Contribution is taken from the initial premium.

3. Transfers and Holding of Shares.

(a) This Agreement at all times shall apply to any and all shares of stock in the Company, whether now held, purchased hereunder, or acquired hereafter by the Shareholder (collectively, the "Shares");

(b) The Shareholder shall not assign, sell, exchange, give, bequeath, encumber, pledge, alienate, hypothecate, or otherwise in any manner whatsoever, either voluntarily or involuntarily, transfer any of the Shareholder's Shares (any such disposition being hereinafter referred to as a "Transfer"), except (i) in accordance with this Agreement, or (ii) by operation of law in the event of a merger or business combination in which the Shareholder is a party, *provided, however*, that following the merger or business combination, the Shares are held by an individual or entity whose ownership of the Shares satisfies the requirements of the Liability Risk Retention Act of 1986, as amended, as well as the eligibility requirements of the Company. The Company shall not honor or give effect on the books of the Company to any Transfer of, or any attempt to Transfer any Shares until it is satisfied that the requirements of this Agreement have been met;

(c) If the Company so determines, it may cause to be placed on the certificates for Shares the following notation, and the Shareholder shall cooperate with the Company in the placement of such notation on his certificate(s):

The holder's power to transfer this stock is limited by an Agreement between the Company and the Shareholder, a copy of which (together with any amendments to the Agreement) is on file at the principal office of the Company.

4. Certain Obligations of the Shareholder. In addition to the other obligations set forth in this Agreement, the Shareholder agrees to perform and comply with all of the following:

(a) Pay promptly when due the amounts agreed to be paid for the purchase of the Shares;

(b) Maintain insurance coverage with the Company and pay all premiums in respect of such insurance coverage in full and when due, in accordance with the terms and conditions quoted to the Shareholder for such insurance coverage;

(c) Comply with the terms of this Agreement and the Company's Charter and Bylaws, copies of which have been made available to the Shareholder, provisions of any contract of insurance between the Shareholder and the Company, applicable underwriting standards, and any applicable risk management/loss prevention program developed by the Company.

5. Dividends. The Shareholder acknowledges that the Company may from time to time declare and pay shareholder dividends to the shareholders. The Shareholder further acknowledges and agrees to the following:

(a) The amount, timing and payment of dividends are within the sole discretion of the Company. No dividends will be paid by the Company unless the Board of Directors determines that such payment is prudent and in the best interests of the Company and unless the Company shall be permitted to make such payment pursuant to Tennessee law;

(b) The Company may elect in its sole discretion to retain its profits rather than distribute them as dividends;

(c) Any payment of dividends is not assured;

(d) Shareholder dividends shall be declared and payable only from the profits of the Company as a whole, and shareholder dividends may not be paid to the Shareholder even if the Shareholder's individual results are profitable.

6. Termination of Shareholder Status. Each of the following events (hereinafter, a "Termination Event") shall require the Shareholder (or his estate or legal or personal representative, as the case may be) to sell all of the Shares back to the Company, shall cause the Shareholder's rights as a shareholder in the Company to immediately and automatically terminate, and shall likewise require the Company to redeem and repurchase all of the Shares owned by the Shareholder, all in accordance with Section 7 below:

(a) The Shareholder no longer satisfies the eligibility requirements applicable to the Shareholder on the effective date of this Agreement;

(b) The Shareholder's insurance policy from the Company is cancelled or non-renewed for any reason whatsoever, or the Shareholder otherwise ceases to have a current policy of insurance in force from the Company for any reason whatsoever;

(c) The death or dissolution of the Shareholder;

(d) All or any part of the Shares are attached or seized in an execution proceeding and such attachment or execution is not discharged or otherwise dissolved within thirty (30) days;

(e) All or any part of the Shares are attached, seized or subject to any order or decree of any court authorizing or directing any Transfer of all or any part of the Shares in any proceeding for divorce, alimony, separate maintenance or distribution of marital property; or

(f) Any attempt by the Shareholder to Transfer his Shares other than to the Company;

(g) Bankruptcy or other insolvency of the Shareholder; or

(h) Failure of the Shareholder to satisfy any deductible within thirty (30) days of demand.

7. Terms of Redemption.

(a) Upon the occurrence of a Termination Event, the Shareholder or his estate or legal or personal representative, and any other holder of all or any part of the Shares, as the case may be (hereinafter, individually and collectively, the "Transferor") shall immediately tender all Shares to the Company for redemption at the price specified in Section 7(b) below;

(b) The price to be paid to a Transferor for the redemption of Shares upon a Termination Event shall be determined under the applicable Subsection (i) through (iii) below (as applicable, the "Price"):

(i) If the Termination Event occurs four (4) years or more from the initial inception date of the insurance coverage and such policy has been maintained continuously with no interruption of coverage with respect to the Shareholder (the "Inception Date"), the Price shall be determined by the Board of Directors with a total price not to exceed \$100.00;

(ii) In the event that coverage has not been continuously maintained for at least four (4) years, the Shareholder will not be entitled to any payment;

(iii) All such payments must meet all applicable regulations as set forth by Department;

(c) All amounts due the Company for any reason from the Shareholder may be offset against any distribution to the Shareholder;

(d) Determination of the amount of the redemption, if any, for the Shares shall be held within sixty (60) business days of the latest of (i) the occurrence of the Termination Event, (ii) the date on which the President of the Company actually learns of the Termination Event, or (iii) the preparation of the Company's regularly-prepared fiscal year-end financial statements;

(e) The payments shall be made annually in equal amounts over five (5) years on each of the five anniversary dates of the Termination Event. Such payments shall be made only in the event that the Shareholder has met all of the obligations of the redemption;

(f) Notwithstanding anything herein to the contrary, the Company shall not be obligated to pay any such amounts in the event that the Company's Board of Directors, in its sole discretion, determines that any such payment would adversely affect the Company's operations and/or financial condition. The Company shall have the sole right to eliminate, suspend and/or defer any such payment based upon such determination. Furthermore, any such payment shall be subject to the Company having met any requirements and having obtained any such required approval by the Department.

8. Waiver of Claims Against Shareholders; Rights of Third Parties.

(a) The Shareholder hereby agrees to waive any claim it may have against any other shareholder, the administrator, or the manager based on the insolvency of the Company or any related entity thereof;

(b) No person, except the Company or any shareholder, shall be deemed to have any right conferred upon it by any provision of this Agreement. No term of this Agreement shall be enforceable against the Company or any shareholder except by the Company, its assignee, or one or more shareholders.

9. Shareholder's Representations and Warranties. The Shareholder hereby represents and warrants to the Company that:

(a) The Company has made available to the Shareholder and its advisors the opportunity to evaluate an investment in the Company, and to obtain additional information and to evaluate the merits and risks of this investment and to ask questions of, and receive satisfactory answers from, representatives of the Company concerning the terms and conditions of this investment;

(b) The Shareholder understands the risks involved in an investment in the Company. The Shareholder recognizes that an investment in the Company is speculative and involves substantial risk of loss;

(c) The Shareholder is an "accredited investor" as such term is defined in applicable federal and State securities laws, and the Shareholder can afford a loss of the entire investment in the Company;

(d) The Shareholder represents that its knowledge and experience in financial and business matters in general are such that it is capable of evaluating the merits and risks of an investment in the Company;

(e) The Shareholder is purchasing the Shares solely for its own account and not with a view to distribution, sale or subdivision, or for the account of any other individual, corporation, firm or person;

(f) The Shareholder is purchasing the Shares as part of an insurance program, and for the sole purpose of obtaining insurance coverage which may be otherwise unavailable to Shareholder, and the Shareholder is not making this investment with the expectation of profiting from the operations of the Company or from any sale, redemption or repurchase of stock;

(g) The Shareholder recognizes that there will be no public market for the Shares and that the transferability of the Shares is restricted;

(h) No person or firm is promising or guaranteeing that the Shareholder will receive a return or profit from its investment in the Company, nor is any such return or profit expected or contemplated; and

(i) The person(s) executing this Agreement on behalf of the Shareholder has/have the authority to execute this Agreement, without the necessity of additional signatories.

10. Proxy. The undersigned shareholder of Onyx Insurance Company, Inc., a Risk Retention Group, hereby appoints the Manager of Onyx Transportation Services LLC as the proxy of the undersigned, to attend all shareholders' meetings, and to exercise all shareholder rights of the undersigned, including without limitation the right to vote, for eleven (11) months from the date of the filing of this proxy to the extent permitted under applicable law; provided, however, that the undersigned may revoke this proxy at any time either by (i) attending any such shareholders meeting and declaring this proxy to be revoked, or (ii) submitting a written revocation to the Secretary of the Company at any time prior to any such meeting.

11. Assignment.

(a) By Shareholder. The Shareholder may not assign any right, claim, or interest it may have under this Agreement or under any policy issued by the Company or a subsidiary thereof, except (i) as specifically may be agreed to in writing by the Company, or (ii) subject to the limitations set forth in Section 3.b. above, by operation of law in the event of a merger or business combination to which the Shareholder is a party. No creditor, assignee or third-party beneficiary of the Shareholder shall have any right, claim, or title to any part, share, interest, funds, or assets of the Company except as specifically may be agreed to in writing by the Board of Directors of the Company. Any successor to the assets, liabilities or operations of the Shareholder shall be liable to the Company or its assignee for any amounts due the Company or the Company from such Shareholder;

(b) By Company. This Agreement may be transferred and assigned by operation of law to any successor entity to the Company in connection with any merger or other business combination to which the Company is a party.

12. Severability. Should any portion, term, condition, or provision of this Agreement be determined by a court of competent jurisdiction to be invalid under any applicable law or otherwise rendered unenforceable, the validity of the remaining conditions and provisions shall not be affected thereby.

13. Governing Law. This Agreement shall be construed in accordance with the substantive law of the State of California, without regard to principles of conflicts of laws. The term "person" shall mean any individual, entity, unincorporated association, or other juridical person. Any reference to a gender, masculine, feminine, or neuter, shall refer to all genders.

14. ARBITRATION AND CLASS ACTION WAIVER.

(a) Any controversy or claim arising from or relating to this Agreement or the breach thereof, shall be settled by arbitration in accordance with the Federal Arbitration Act. Arbitration will be venued in San Francisco, California, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Claims within the monetary limit of the small claims court shall be litigated in such court at the request of any party, so long as all parties limit their right to recovery to the jurisdiction of the small claims court;

(b) Any claim filed in small claims court shall not be deemed to be a waiver of the right to arbitrate, and, if a counter claim in excess of the jurisdiction of the small claims court is filed in the municipal or superior court, then the party filing in small claims court may demand arbitration pursuant to this paragraph;

(c) The arbitrators will have authority to award actual monetary damages only. No punitive or equitable relief is authorized. The arbitrators' decision shall be final and legally binding. All parties shall bear their own costs for arbitration and no attorneys' fees or other costs shall be granted to either party; and

(d) Class Action Waiver. No party shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities or arbitrate any claim as a representative member of a class.

15. Term. This Agreement shall continue in effect until it is rescinded by the mutual written consent of the parties hereto or otherwise terminated as provided by this Agreement or applicable law.

16. Amendment. This Agreement may be amended upon the mutual written consent of the parties.

17. Complete Agreement. This Agreement, including all counterparts hereof, the Charter, Bylaws, policy terms, and any applicable rules and regulations that may be adopted from time to time by the Board of Directors, constitutes the full and complete terms of this Shareholders Agreement. There are no oral understandings or agreements not set forth in writing herein or in the aforementioned other writings. Shareholder acknowledges the receipt of a copy of the Charter and Bylaws of the Company. This Agreement may be executed in any number of counterparts, all of which taken together shall be deemed one original.

18. Notice. All offers, acceptances and notices shall be in writing and sent certified mail, return receipt requested, to the principal office of the Company, when addressed to the Company, or to the address of the Shareholder appearing on the Company's books, when addressed to the Shareholder.

IN WITNESS WHEREOF, the parties hereto have caused this Subscription and Shareholders Agreement to be executed and effective as of the date first above written.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION AND CLASS-ACTION WAIVER WHICH AFFECTS YOUR LEGAL RIGHTS AND MAY BE ENFORCED BY THE PARTIES.

ONYX INSURANCE COMPANY, INC.,
A RISK RETENTION GROUP

Date: 03/29/2018

By:



Jason Sears, Secretary

SHAREHOLDER

Date: _____

By: _____

Name: _____

Title: _____

Number of Shares Acquired Based Upon Formula: 74

**ONYX BUSINESS AUTO POLICY
FORM UM 1101**

POLICY NUMBER: OIC-SC-0001119-02
POLICY PERIOD: 3/29/2018 - 3/29/2019
NAME INSURED: Viktor Kleuchenia (Imperial Cab)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

UNINSURED/UNDERINSURED DEDUCTIBLE ENDORSEMENT

It is hereby agreed and understood that the greater of the state mandated deductible or the policy deductible will be applied to Uninsured/Underinsured claim settlement payments. Such condition to apply to those policies that provide Uninsured/Underinsured coverage.

By: 
Jason Sears - secretary
(Authorized Representative)
Date: 3/29/2018

Installment Schedule

Insured: Viktor Kleuchenia (Imperial Cab)

Policy #: OIC-SC-0001119-02

Policy Period: 03/29/2018 - 03/29/2019

Due Date	Premium Due	Tax Due	Installment Fee	Total Due
03/29/2018	\$1,046.00	\$7.20	\$0.00	\$1,053.20
04/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
05/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
06/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
07/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
08/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
09/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
10/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
11/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
12/29/2018	\$198.40	\$2.88	\$5.00	\$206.28
01/29/2019	\$198.40	\$2.88	\$5.00	\$206.28

Notes:

- 1) Payments must be received by Onyx on or before the due date otherwise a Notice of Cancellation will be generated.
- 2) Changes to the policy (adding or removing vehicles, etc.) may change future installment amount dues.



Texas Insurance Company
P.O. BOX 3646, OMAHA, NE 68103-0646

Writer's Direct Line 402-342-4900 ext. 4141; Facsimile 402-393-8558

E-Mail: jeffreysilver@silver-law.net

September 9, 2024

Via Electronic Mail and FedEx

Jared C. Williams, Esq.
159 Civitas Street, Suite 204
Mount Pleasant, South Carolina 29464

RE: Viktor Kleuchenia v. Brian McLeod
Civil Action No.: 2022-CP-04596

Dear Mr. Williams:

This letter will follow up on my September 4, 2024 correspondence with respect to the above matter.

As I indicated Onyx Insurance Company issued Policy, No. OIC-SC-0001119-2 for the period of March 29, 2018 to March 29, 2019 to Viktor Kleuchenia (the "Policy").

The Policy, a copy of which was included in my September 4, 2024 correspondence provided \$25,000 in uninsured/underinsured motorist coverage.

Accordingly, Onyx/Texas Insurance Company herewith tenders its Check No. 864 in the amount of \$25,000 in full and complete settlement of its obligations under the Policy and settlement of the June 4, 2024 Order and the July 1, 2024 Order for Costs.

Very truly yours,

JEFFREY A. SILVER
Secretary and General Counsel

JAS/ld
Enclosure

CC: File
Michael D. Freeman via Electronic Mail

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Viktar Kleuchenia,

PLAINTIFF,

v.

Brian McCleod,

DEFENDANT.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2021-CP-26-04596

Affidavit of Jeffrey A. Silver

Personally appeared before me Jeffrey A. Silver, who, being duly sworn, states the following:

1. I am over the age of 18, am competent to testify, and make this affidavit of my own personal knowledge of the matters stated herein.
2. I am the corporate Secretary and General Counsel for Texas Insurance Company ("TIC").
3. Texas Insurance Company is a successor to Onyx Insurance Company ("Onyx" and together with TIC collectively referred to as "Texas Insurance" or the "UIM Carrier"), by virtue of an Assumption and Indemnity Agreement between the two companies effective May 19, 2021. Prior to the execution of this agreement, Onyx Insurance provided the Plaintiff with a commercial automobile policy (Policy No. OIC-SC-0001119-02) with effective dates of 3/29/2018 to 3/29/2019 (the "Policy"). This Policy provides for \$25,000 in underinsured motorist coverage benefits to the Plaintiff.
4. Texas Insurance reserves all rights under the Policy. Nothing in this affidavit or related motion should be construed as a waiver of any of Texas Insurance's rights under the Policy.

5. I have personally reviewed all documents received by Texas Insurance and their respective claims administrators pursuant to this claim and the resulting litigation.

6. I am aware of and have reviewed the Special Referee's Order dated July 2, 2024, awarding costs and interest as damages in this case.

7. Based on a review of our records, the "Plaintiff's Offer of Judgment for UIM Benefits" dated August 17, 2023, was never served upon Texas Insurance.

8. Based upon a review of our records, Texas Insurance never received service of the Plaintiff's Motion for Costs and Interest or notice of the hearing on Plaintiff's Motion for Costs and Interest.

9. Based upon the foregoing, Plaintiff's Offer of Judgment did not comport with S.C. Code Ann. § 15-35-400 for lack of service and therefore the award of costs and interest in this matter was improper and should be vacated.

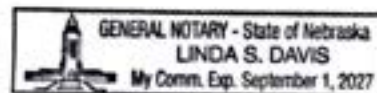


Jeffrey A. Silver

*Sworn to and Subscribed before me
This 13th day of September, 2024.*



Official Signature of Notary Public for Nebraska



Linda S. Davis, Notary Public
Printed Name of Notary

My Commission Expires: 09/01/2027



Texas Insurance Company
P.O. BOX 3646, OMAHA, NE 68103-0646

Writer's Direct Line 402-342-4900 ext. 4141; Facsimile 402-393-8558

E-Mail: jeffreysilver@silver-law.net

October 4, 2024

Via Electronic Mail, Certified Mail and U.S. Mail

Jared C. Williams, Esq.
P.O. Box 403
Mount Pleasant, South Carolina 29465

RE: Viktor Kleuchenia v. Brian McLeod
Civil Action No.: 2022-CP-04596

Dear Mr. Williams:

This letter will follow up on my September 4, 2024 and my September 9, 2024 correspondence with respect to the above matter.

As you know, Onyx Insurance Company issued Policy, No. OIC-SC-0001119-2 for the period of March 29, 2018 to March 29, 2019 to Viktor Kleuchenia (the "Policy").

On September 9, 2024 we sent a payment of \$25,000 in uninsured/underinsured motorist coverage under the Policy to you by FedEx which was returned, although a copy of the correspondence was sent to you by electronic mail.

Since that time, it has been determined that there are two vehicles on the Policy. As a result, uninsured/underinsured motorist coverage can be stacked in South Carolina resulting in a total uninsured/underinsured benefit of \$50,000.00 under the Policy.

Accordingly, Onyx/Texas Insurance Company herewith tenders two checks, Check No. 864 for \$25,000 and Check No. 898 in the amount of \$25,000 bringing the total to \$50,000 in full and complete settlement of its obligations under the Policy and settlement of the June 4, 2024 Order and the July 1, 2024 Order for Costs in the above referenced litigation.

Very truly yours,

JEFFREY A. SILVER
Secretary and General Counsel

JAS/ld
Enclosure

CC: File
Michael D. Freeman via Electronic Mail

POLICY NUMBER: OIC-SC-0001119-02

BUSINESS AUTO POLICY DECLARATIONS

ONYX INSURANCE COMPANY, INC. A RISK RETENTION GROUP

One Nashville Place
150 Fourth Avenue, North
Suite 1100
Nashville, TN 37219

Mailing Address:
237 Kearny Street, #143
San Francisco, CA 94108
Phone: 917-822-4238

ITEM ONE

NAMED INSURED: Viktar Kleuchenia (Imperial Cab)

MAILING ADDRESS: 617 36th Ave N
#G
Myrtle Beach, SC 29577

Note: The insurance policy is issued by Onyx Insurance Company Inc., a Risk Retention Group. Your Risk Retention Group may not be subject to all of the insurance laws or regulations of your State. State insurance insolvency guaranty funds are not available for your Risk Retention Group. Read your policy and its coverage conditions thoroughly.

POLICY PERIOD:

FROM: 03/29/2018 TO: 03/29/2019
(AT 12:01 STANDARD TIME AT YOUR MAILING ADDRESS)

BUSINESS DESCRIPTION: Taxi Service

IN RETURN FOR THE PAYMENT OF PREMIUM, AND SUBJECT TO ALL TERMS OF THIS POLICY AND THE INFORMATION PROVIDED ON THE SIGNED APPLICATION, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

SCHEDULE OF COVERAGES AND COVERED AUTOS

This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "Autos" shown as covered autos, which must be reported to the Company prior to effecting coverage.

COVERAGES	COVERED AUTOS	LIMIT	PREMIUM
BODILY INJURY AND PROPERTY DAMAGE LIABILITY	7	\$25,000.00 Per Person / \$50,000.00 Per Accident / \$25,000.00 Property Damage	<u>\$2,480.00</u>
PERSONAL INJURY PROTECTION (OR EQUIVALENT NO FAULT COVERED)	<u>EXCLUDED</u>	<u>N/A</u>	<u>N/A</u>
UNINSURED MOTORIST	7	\$25,000.00 Per Person / \$50,000.00 Per Accident / \$0.00 Property Damage	<u>INCLUDED</u>
UNDERINSURED MOTORIST	7	\$25,000.00 Per Person / \$50,000.00 Per Accident / \$0.00 Property Damage	<u>INCLUDED</u>
DEDUCTIBLE	7	<u>N/A</u>	<u>N/A</u>

PREMIUM

Commercial Automobile Bodily Injury & Property Damage Liability	<u>\$2,480.00</u>
Uninsured Motorist Coverage	<u>INCLUDED</u>
Total	<u>\$2,480.00</u>
PREMIUM SHOWN IS PAYABLE(minimum 25% of premium is earned at inception):	
\$496.00 at inception and 10 installments of \$198.40 each. Installments are due thirty (30) days thereafter prior to the due date.	

ITEM TWO: SCHEDULE COVERED AUTOS

DESCRIPTION (LIST ADDITIONAL VEHICLES ON SEPARATE SCHEDULE)					
MAKE	YEAR	MODEL	BODY TYPE	SERIAL NUMBER	VIN
See Schedule On File With the Carrier					

ITEM THREE: LIABILITY DEDUCTIBLE

The Liability Coverage is changed as follows:

The damages including loss adjustment expense caused in any one "accident" that would otherwise be payable under the Liability Coverage will be reduced by the Liability Deductible as shown in the Coverage Schedule on page two above prior to the application of the Limit of Insurance provision. Such Deductible upon invoicing will be paid immediately to the Carrier, and failure to pay will be subject to policy cancellation.

ITEM FOUR: COVERED AUTOS

The Coverage afforded hereunder only covers such automobiles as scheduled with the Carrier.

ITEM FIVE: COVERED DRIVERS

The coverage afforded hereunder is limited to those named drivers as scheduled with the Carrier.

Endorsements Attached to this Policy:

Countersigned:

Date:

Ven Sura

Jason Sears - Secretary
(Authorized Representative)

Date: 03/29/2018

ASSUMPTION CERTIFICATE

Insured: Viktor Kleuchenia (Imperial Cab)

Policy Number: OIC-SC-0001119-02

Assumption Date: June 30, 2021

THIS IS TO CERTIFY that pursuant to the terms of an Assumption and Indemnity Agreement effective June 30, 2021 by and between **ONYX INSURANCE COMPANY, INC., A RISK RETENTION GROUP** ("Onyx") and **TEXAS INSURANCE COMPANY**, a Texas fire and casualty insurance company (the "Company"), the Company has assumed all of the obligations and liabilities of Onyx under the above Policy and all endorsements and riders thereto. All terms and conditions of the Policy remain unchanged except that from and after the Assumption Date, the Company shall be the insurer under the Policy. All notices, claims, and correspondence shall be made directly to the Company's administrator at the address specified below.

IN WITNESS WHEREOF, TEXAS INSURANCE COMPANY has caused this Assumption Certificate to be executed by its duly authorized officer.



Jeffrey A. Silver, Texas Insurance Company

Administrator
10805 Old Mill Road
Omaha, NE 68154

**THIS CERTIFICATE BECOMES A PART OF YOUR POLICY
AND SHOULD BE ATTACHED TO THE POLICY**

RECEIVED

Oct 27 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Robert W. Buffington, Special Referee

Appellate Case No. 2025-000968

Ex Parte: Texas Insurance Company, Appellant,

Viktar Kleuchenia, Respondent,

v.

Brian McCleod, Defendant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 24, 2025

s/ Michael D. Freeman

Michael D. Freeman (Bar #71260)

600 Monson Street

PO Drawer 570

Beaufort, SC 29901

843-521-4242

843-521-4247 (fax)

mfreeman@griffithfreeman.com

Attorneys for Appellant

RECEIVED

Oct 27 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Robert W. Buffington, Special Referee

Appellate Case No. 2025-000968

Ex Parte: Texas Insurance Company, Appellant,

Viktar Kleuchenia, Respondent,

v.

Brian McCleod, Defendant.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Respondent, Viktar Kleuchenia and other counsel of record on this day by emailing a copy of it as follows:

Jared C. Williams
Law Office of Jared C. Williams
PO Box 403
Mount Pleasant, SC 29456
jared@williamslawsc.com
Attorneys for Viktar Kleuchenia

G. Michael Smith, Sr.
Maguire Law Firm
1600 North Oak St., Suite B
Myrtle Beach SC 29577
mike@maguirelawfirm.com
Attorneys for Brian McLeod

Robert Walton Buffington
Buffington Law Firm, LLC
PO Box 6
Pawleys Island, SC 29585
bobby@bufflawfirm.com
Special Referee

October 24, 2025

GRIFFITH FREEMAN & LIIPFERT

s/ Michael D. Freeman
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600 Monson Street
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Beaufort, SC 29901
843-521-4242
843-521-4247 (fax)
mfreeman@griffithfreeman.com
***Attorneys for Appellant Texas Insurance
Company, as successor to Onyx Insurance
Company***